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# Administrative measures to prevent and tackle crime

Legal possibilities and practical  
application in EU Member States

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Administrative measures to prevent and tackle crime



# ADMINISTRATIVE MEASURES TO PREVENT AND TACKLE CRIME

*LEGAL POSSIBILITIES AND PRACTICAL APPLICATION  
IN EU MEMBER STATES*

A.C.M. SPAPENS, M. PETERS AND D. VAN DAELE (EDS.)



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## FOREWORD

Over the last years a great deal of attention has been devoted to the administrative approach at the European level, within the context of preventing and combating organised crime. In fact, the Stockholm programme, the Internal Security Strategy and the COSI work programme all view this approach as a useful supplement to the traditional judicial and police approach against organised crime.

The administrative approach was already subject to a range of initiatives, among them the delivery of different EU handbooks on complementary approaches and actions to prevent and combat organised crime, and the establishment of the Informal Network of contact points on the administrative approach.

In 2010, during the Belgian EU Presidency, the Council adopted conclusions in which the Informal Network was requested to assess the possibilities to strengthen the exchange of information between administrative bodies and traditional law enforcement organisations. To this end the Dutch Ministry of Security and Justice (coordinator), together with Tilburg University (the Netherlands) and the KU Leuven – University (Belgium), supported by the Belgian Home Affairs Ministry, applied for a grant at the Prevention of and Fight against Crime Programme of the European Commission. In 2011, the European Commission awarded this ISEC grant to conduct a *‘study on the potential for information exchanges between administrative bodies and traditional law enforcement organizations to support the use of administrative measures within EU Member States and at EU level’*. The underlying report is the result of this ISEC grant.

The study aims to contribute to the existing body of knowledge concerning an administrative approach to crime in the European Union in the following manner. First, it explored the legal options available to national administrative authorities in the selected Member States. Options that prevent criminals from misusing the legal infrastructure, such as licensing procedures or tender procedures. This resulted in ten separate country reports (Chapters 2-11), as well as a comparison of those legal options in the ten Member States (Chapter 12). Second, it considered the practical application of the legal options available in the selected Member States. The results of this empirical study are reviewed in Chapter 13. Chapter 14 explored the potential for information exchange between EU Member States in support of an administrative approach to crime. Last, the conclusions and the way forward were presented in part V of this study (Chapters 15 and 16).

I would like to take this opportunity to thank the researchers, professor Toine Spapens, professor Dirk van Daele and Maaïke Peters for their great work over the last two years in carrying out this extensive study. Secondly I would like to thank the members of the Informal Network for their active contribution in finding the right experts and researchers

## *FOREWORD*

within the selected 10 EU Member States. Also, I would like to thank all the interviewed persons, whom have made this research possible. Lastly, a special word of thanks to the European Commission for financial supporting this project.

It is my firm believe that the outcome of this report will highly contribute to the further development of the administrative approach and more important to the successful prevention and repression of organised crime, both in EU Member States and at the EU level. In view of the Dutch EU Presidency in 2016, I am confident that the recommendations of this project will provide a solid basis for future actions and interventions at the Union level to be taken by the Council and the European Commission.

Kees Riezebos  
Ministry of Security and Justice  
Director Department of Safety and Governance  
Den Haag, February 2015

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**PART I**  
**GENERAL INTRODUCTION**



# 1 INTRODUCTION

*A.C.M. Spapens, M. Peters & D. Van Daele*

## 1.1 BACKGROUND OF THE RESEARCH

Criminals and persons involved in serious and organized crime often do not limit their activities to purely illegal ones such as drug trafficking, fraud or property crimes. They also invest money in legal activities and businesses, for instance to exploit the revenues of their crimes or to generate a legal income. Criminals may establish or take over a construction company and then tender for government contracts. The ‘business processes’ of most types of organized crime also require legal facilities. Criminals who traffic illicit drugs or weapons may need to organize a shipment of legal goods in which they can hide the contraband. That might require the cooperation of a regular trader, or the setting up of a company as a front, for which they may also need assistance from legal advisers and accountants. Finally, criminals can also acquire a public licence to run a bar or gambling arcade and use it for criminal purposes, such as money laundering, tax fraud and drug dealing. Even if criminals engage in businesses without using them to commit crimes, their actions will still undermine the integrity of certain economic activities. For example, if a business conflict occurs, criminals may easily revert to the violent methods common to the underworld. When the involvement of criminals in a particular economic activity becomes known, it may well destroy the public image of that entire sector, as happened in the real property sector in the Netherlands. Finally, criminals who also have a substantial illegal income and use their company partly for money laundering do not worry about being as competitive as regular companies and may underbid contracts to outcompete *bona fide* entrepreneurs.

Authorities thus have a particular interest in preventing criminals from either using the economic infrastructure to acquire a legal income or from misusing businesses to facilitate crimes and applying their criminal proceeds towards this purpose. Administrative laws are of particular importance in this respect.

To begin, all governments in functioning democracies regulate economic activities to some extent to ensure the safety of their citizens, economy and environment. Gambling, for example, carries the risk of addiction and operators are therefore required to comply with standards to minimize this risk. The same applies to the sale of alcohol, prescription medicines and firearms. If a company wants to build a new chemical plant, it must comply with numerous regulations to avoid damaging the environment. It is customary for regu-

lated business activities to be inaccessible to persons who have been convicted of crimes that could affect their suitability to operate a certain type of business or to perform a certain job. One example is a convicted paedophile who wants to start a day care centre for young children or apply for a job in one. Second, when public authorities invite tenders or grant subsidies, the applicants must meet requirements that allow officials to select the most eligible and reliable candidate. Third, local and other authorities are empowered to maintain public order in their territory. This allows them to issue fines, but also to regulate activities that may cause nuisance. Finally, they might even have the power to forfeit assets in the scope of administrative proceedings.

An administrative approach applied in addition to or coordinated with the traditional instruments of criminal law is a potentially powerful tool to prevent and combat serious and organized crime. The European Commission strongly encourages the Member States to apply such an approach and facilitates the Informal Network of Contact Points on the Administrative Approach to Prevent and Fight Organized Crime. However, the exact scope and application of administrative measures in the Member States is still unclear. This study aims to explore how and when such administrative measures can and are applied in the context of serious and organized crime. Moreover, it aims to study whether such an approach is possible in an international context, particularly the potential for exchanging information between Member States. The latter aim is of major importance in preventing displacement effects of serious and organized crime from one Member State to another due to differences in the extent to which administrative measures are applied to prevent, disrupt and repress crime.<sup>1</sup>

In 2011, the European Commission awarded an ISEC grant to the Dutch Ministry of Security and Justice (coordinator) to conduct a *'study on the potential for information exchanges between administrative bodies and traditional law enforcement organizations to support the use of administrative measures within EU Member States and at EU level'*. Tilburg University (the Netherlands) and the Catholic University of Leuven (Belgium) conducted this research, supported by the Belgian Home Affairs Ministry. The underlying report is the result of this ISEC grant.

## 1.2 SCOPE OF THE STUDY AND DEFINITION OF 'ADMINISTRATIVE APPROACH'

### 1.2.1 *Scope of the study*

The present study covers three main areas. It first explores the applicable legislative framework in ten selected EU Member States (see below) in order to present a comparative

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1 See Van Daele et al. 2010.

overview of the administrative laws that may be used in an administrative approach to crime.

For practical reasons, the legal study is limited to four types of administrative regulations:

1. the preventive screening and monitoring of applicants (natural persons and legal entities) for permits, tenders and subsidies;
2. the power to close or expropriate premises when public nuisance occurs in or around those premises;
3. the possibility of seizing criminals' assets within the framework of an administrative procedure and outside the scope of criminal procedure;
4. other common methods that administrative authorities can use to tackle and prevent crime.

The selection of the first type of administrative measure was based on the definition formulated in the EU Handbook published during the Hungarian Presidency of the Council of the EU in 2011.<sup>2</sup> The second focus area was also based on the premise of the EU Handbook, which cites the 'closing of criminal business' as part of an administrative approach.<sup>3</sup> To ensure that all relevant instruments were taken into account when drafting the separate country reports, the broader definition of 'public nuisance' was also chosen. The third focus area of asset seizure was selected because the EU Handbook indicates that administrative measures are in place in some Member States for such purposes.<sup>4</sup> The fourth focus area ensured that administrative measures that are specific or idiosyncratic to certain Member States were not excluded from the research. The legal study resulted in ten country reports and a comparative report (Part II of this study).

The second part of our research concerned the practical application of the available legislative framework within the context of serious and organized crime. For this purpose we conducted empirical research in the ten selected Member States. This part explores the practical application of the legal measures we have identified, as well as opportunities for administrative authorities to cooperate with one another and with law enforcement agencies and tax authorities, respectively (Part III of this study).

The third part of the project focuses on information exchange across national borders. This specifically concerns criminal and fiscal information to be used in administrative procedures, for instance licensing. Exchange of such information is essential because citizens of the EU are free to move and find jobs or start a business in another Member State. The same holds true for criminals (Part IV of this study).

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2 10899/11 JAI 380 COSI 44 CRIMORG 77 ENFOPOL 179, p. 11.

3 10899/11 JAI 380 COSI 44 CRIMORG 77 ENFOPOL 179, p. 11.

4 10899/11 JAI 380 COSI 44 CRIMORG 77 ENFOPOL 179, p. 34. For instance in Italy.

### 1.2.2 Definition of the concept ‘administrative approach’

At the start of this project, there was no clear definition of the concept of an ‘administrative approach’. This is not surprising, as there is no universal definition of ‘administrative law’,<sup>5</sup> or ‘administrative authorities’<sup>6</sup> for that matter. To elaborate, in continental legal systems, administrative law is conceived subject-specific (e.g. environment, spatial planning), based on the national context. Hence, differences exist between the various continental legal systems on administrative law. Also, in common law countries, administrative law regulates the implementation of public administrative authorities, their functions and the control over the legitimacy of the implementation, also called judicial review.<sup>7</sup> The common law conception of administrative law is therefore narrower than in the continental legal systems.<sup>8</sup> Such ambiguity should be taken into account when studying an administrative approach to crime.

Moreover, many different instruments may be viewed as part of an administrative approach, for example the screening and monitoring of legal and natural persons, but the same is true of penitentiary regulations, personal preventive measures, regulations to prevent money laundering, and the seizure of assets.<sup>9</sup> This has influenced the debate about the application of an administrative approach to crime, as can be plainly seen in EU documents on this topic.<sup>10</sup>

The present study started with the following definition as a starting point for the legal part of the research (Part II). The **administrative approach**, also known as the **non-traditional approach** or **non-penal approach**,<sup>11</sup> was defined as follows:

*An administrative approach to serious and organized crime involves preventing the facilitation of illegal activities by denying criminals the use of the legal administrative infrastructure.*

However, to include the practice of the selected Member States, which use administrative approaches to serious and organized crime not only to prevent but also to disrupt and repress illegal activities, the following definition was used in the framework of the empirical study (Part III):

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5 For a comparison of definitions of ‘administrative law’, see Backaveckas 2014, p. 7-47.

6 See Klip & Vervaele 2002.

7 Backaveckas 2014, p. 236.

8 Backaveckas 2014, p. 243.

9 For example not permitting a person to possess more than one mobile phone.

10 See for instance: Handbook published during the Hungarian Presidency of the Council of the EU in 2011, 10899/11 JAI 380 COSI 44 CRIMORG 77 ENFOPOL 179.

11 These different definitions are based on the Handbook published during the Hungarian Presidency of the Council of the EU in 2011, 10899/11 JAI 380 COSI 44 CRIMORG 77 ENFOPOL 179. An update of this Handbook is now available, but it had not yet been published at the start of the underlying research.



*An administrative approach to serious and organized crime involves preventing the facilitation of illegal activities by denying criminals the use of the legal administrative infrastructure as well as coordinated interventions ('working apart together') to disrupt and repress serious and organized crime and public order problems.*

Certain other terms frequently used in the research have also been defined. Competence was formulated as *'the power of administrative government to utilize the tools to deny criminals the use of the legal infrastructure'*. Administrative authority or government was defined in this study as: *'the Member State's authorities, both on a central and local level, i.e. the central state organs, but also municipalities, cities, provinces, etc.'*<sup>12</sup> Finally the term 'legal infrastructure' was defined as *'tools for citizens to perform activities, such as permits, licences, subsidies, grants, tenders, etc.'*

At the start of the research, we decided to limit the study to measures which tackle 'serious and organized crime', defined as 'offences committed by one or more persons for a prolonged or indefinite period of time, which offences are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit.'<sup>13</sup> During the project it became obvious that we could not make a clear distinction between 'serious and organized crime' and crime in general. We therefore chose to include all types of crime.

### 1.3 METHODOLOGY

The research was carried out between January 2013 and December 2014, a timeframe of two years in total. During this timeframe, ten selected EU Member States were studied. These are, in alphabetical order: Belgium, the Czech Republic, France, Germany, Italy, the Netherlands, Poland, Spain, Sweden and the United Kingdom (limited to England and Wales).<sup>14</sup>

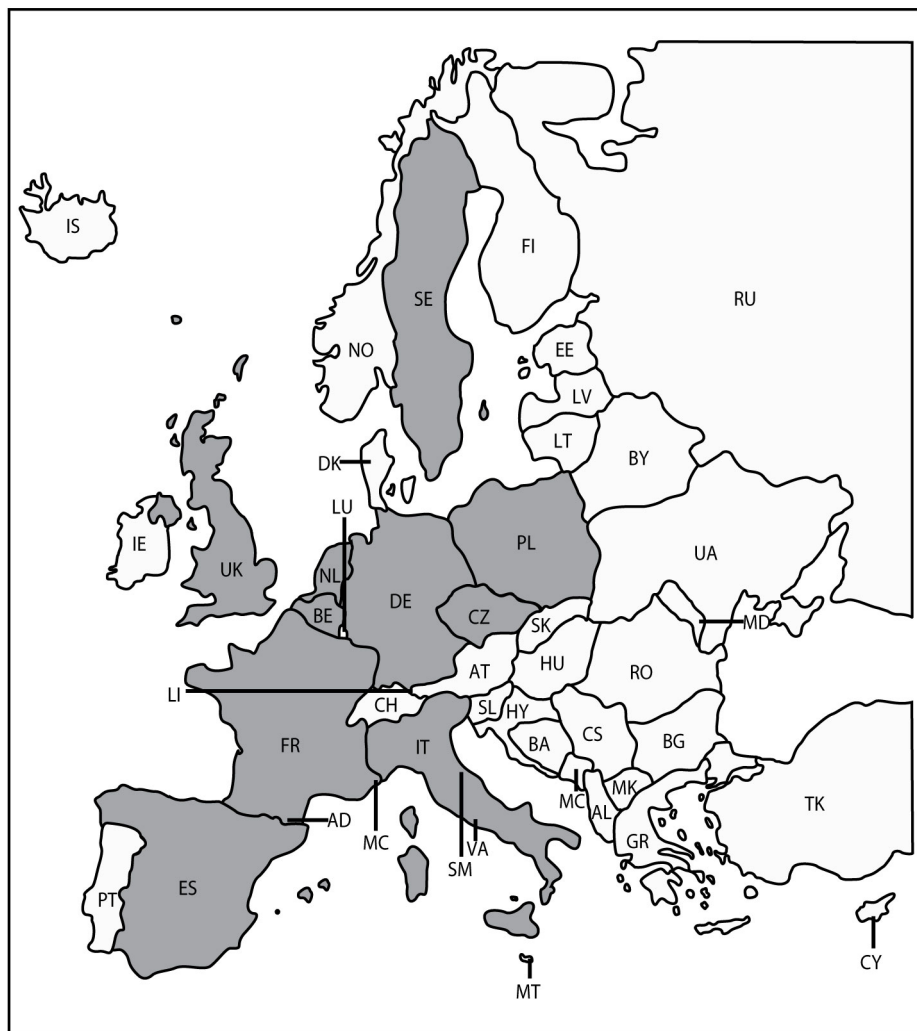
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12 Previous studies indicate that the term 'administrative authorities' is particularly hard to define due to the varying definitions of this term applied in the separate Member States. See for instance: Klip & Vervaele 2002.

13 Europol 2013, p. 41-42.

14 Owing to legislative differences between the four countries of the United Kingdom, we decided at the start of the research to restrict the description of the legislative framework to England and Wales. In addition, the organized crime policies of Scotland and Northern Ireland have been included in the country report. A representative of Police Scotland was interviewed during the empirical phase to shed light on the Scottish system. The organized crime policy of Northern Ireland was not included in the research.

**Figure 1.1 The selected Member States**



The above Member States were selected to represent the various legal systems and the practical application of an administrative approach as it exists in Europe. We therefore selected some traditional civil law systems (France, Germany) as well as the common law system (England and Wales). Additionally, Italy and Spain were chosen to represent Southern Europe, and Poland and the Czech Republic Eastern Europe. Sweden was included to represent the Scandinavian legal systems. Finally, the Netherlands and Belgium were

added because earlier studies in these countries had already produced useful material and both countries have some experience working with the administrative approach and cross-border cooperation in that context (see Part III of this study).<sup>15</sup>

The project began with exploratory research to map the current legal frameworks of the ten selected Member States, and with a study of the legal potential for exchanging information within the context of an administrative approach across national borders. Second, it comprised a study of existing practices in the ten selected Member States. Each of these phases involved two distinct methodologies that we will elaborate on below. This does not mean that the legal and empirical phases were completely separate. Instead, the legal reports served as a basis for the empirical fieldwork. Moreover, the empirical study sometimes served to complement the legal reports, as respondents were able to shed more light on the applicable framework.

### 1.3.1 *Legal study*

As explained in paragraph 1.2.2, the legal study started with the following definition on the administrative approach to crime:

*An administrative approach to serious and organized crime involves preventing the facilitation of illegal activities by denying criminals the use of the legal administrative infrastructure.*

Based on this definition, the following methods were used to study the measures in the selected Member States.

### **Country reports**

To study the legal frameworks in the ten selected Member States, we had legal and other experts write reports on the selected countries. To gain a preliminary understanding of the legal frameworks in the selected Member States and to identify experts and professionals in the field, we asked the relevant members of the EU informal network on the administrative approach to fill in an exploratory questionnaire (appendix 1). They completed the questionnaire in May and June of 2013. The questionnaire provided the working definitions applied in the research, as described above, and asked the respondents to confirm whether there were instruments present in their national legal framework that fit these definitions. They were also asked to provide a brief overview of the applicable legislation and to identify experts in their Member State. Of the selected Member States, all but Germany responded

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<sup>15</sup> Van Daele et al. 2010.

to the questionnaire. The questionnaire served as a starting point for the country reports by the research team and the other experts.

The research team wrote five of the legal country reports (Belgium, England and Wales, France, Germany and the Netherlands). Experts from Tilburg University wrote the studies on England and Wales and the Netherlands. The reports on Belgium, France and Germany were written by an expert from the Catholic University of Leuven. The decision to select 'in-house' experts for these reports was based on their previous research as well as their knowledge of the relevant languages and legal systems.

The reports concerning the Czech Republic, Italy, Poland, Spain and Sweden were written by experts from these Member States employed at universities and, in the case of Sweden, at the National Institute for Crime Prevention (Brå). The research team found these experts through the EU informal network on the administrative approach, the EUCPN network, and its own professional network. In order to support and explain the desired content of the legal reports, members of the research team visited the experts between October and November 2013. The Spanish experts were briefed by conference call. In addition, team members visited Spain in June 2014 to discuss the content of the draft report.

To prepare for the visit, the experts were given several tools to assist them in writing the report. This included a preliminary topic list, consisting of an overview of the intended content of the report and the study's working definitions, the results of the exploratory questionnaire, and the draft country report on the Netherlands as an example. The visit itself included a presentation by the research team to explain the aim and scope of the research and to clarify the concept of an administrative approach by giving several examples. The specific purpose of these examples was to spark ideas with the experts. The above procedure resulted in ten country reports.<sup>16</sup>

To further deepen their understanding of the legal frameworks and general trends that can be found throughout the EU, the team made a legal comparison of the ten country reports (Part II of the present report). The ten legal studies were scrutinized in-depth and by topic in order to find general trends or striking exceptions to those trends. These findings at first glance appear to relate only to trends in the selected Member States. However, because the legal systems of continental Europe can to some extent be seen as similar, some findings can be generalized to the other EU Member States.

### **Report on information exchange across borders**

In addition, the research team drew up a report on the potential for international cooperation in an administrative approach to crime. This report was based on a literature study,

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16 We thank prof. T. (Tijs) Kooijmans (Tilburg University) for his review of and critical comments on the draft reports (Chapter 2-11).

including the European and regional legal instruments allowing for information exchanges between administrative authorities and other authorities, particularly law enforcement agencies and the tax authorities. Moreover, the team studied the existing international infrastructure for information exchange in order to find channels to facilitate such an exchange.<sup>17</sup>

### 1.3.2 Empirical study

Based on the legal framework in the ten selected countries, the research team carried out empirical fieldwork, the aim being to substantiate and integrate the legal study with current practice. Another aim was to explore the needs of the professionals in the field. The empirical study included interviews with professionals at the policy and practical levels in the ten selected Member States, supplemented by project descriptions, presentation slides and other relevant documents.

As referenced in paragraph 1.2.2, the following definition of an administrative approach to crime was used to study the practice in the selected Member States:

*An administrative approach to serious and organized crime involves preventing the facilitation of illegal activities by denying criminals the use of the legal administrative infrastructure as well as coordinated interventions ('working apart together') to disrupt and repress serious and organized crime and public order problems.*

The research team conducted interviews in the ten selected Member States from March to October 2014. It found respondents through the contact points of the EU informal network on the administrative approach and also through the authors of the legal reports. Obviously, where a Member State was far advanced in an administrative approach to crime, it was not difficult to find professionals who could present practical cases. However, this proved more difficult in other countries, where the concept of an administrative approach to crime was less well developed. The visits entailed semi-structured interviews with around 100 respondents (sometimes in the form of group interviews). Moreover, the team attended a seminar organized by the LIEC in the Netherlands on multi-agency collaboration supporting an administrative approach to crime. In particular, they attended presentations by Italian, French and British representatives. For a full overview of the persons interviewed in each Member State, the composition of the interviews and the presentations that the team attended, see appendix 2. Two topic lists were assembled in advance to provide a guideline for the interviews. One topic list was intended for policymakers, and the other

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17 The study by Van Daele et al. 2010 was used as a starting point.

for practitioners (appendix 3). The topic list ensured that the interview addresses relevant topics, but it also gave the interviewer enough freedom to diverge if a respondent turned to another relevant topic.<sup>18</sup> As not all professionals were experts in all relevant fields, this allowed the interviewer to pay closer attention to the field in which the respondent did have expertise. The interviews were recorded (at the interviewee's consent) and the interviewer took notes during the sessions. Moreover, several respondents were so kind as to provide the team with presentations on their respective fields and additional policy and other documents, which furnished further explanations and examples.

#### **1.4 STRUCTURE OF THE REPORT**

This report consists of five parts and is structured as follows. Part II presents the results of the legal studies in the ten selected Member States (Chapters 2–11) and the comparative legal analysis (Chapter 12). Part III comprises the outcomes of the empirical study on the practical application of an administrative approach in the selected countries (Chapter 13). Part IV presents the results of the study on information exchange within the EU (Chapter 14). Finally, Part V addresses the conclusions of this study and recommendations for the way forward (Chapters 15–16).

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<sup>18</sup> Davies 2007, p. 151ff; Flick 2009, p. 156ff.

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**PART II**  
**THE LEGAL FRAMEWORK IN TEN EU**  
**MEMBER STATES**



## 2 THE ADMINISTRATIVE APPROACH IN BELGIUM

*D. Van Daele*

### 2.1 INTRODUCTION: THE DEBATE ABOUT THE ADMINISTRATIVE APPROACH TO COMBATING ORGANISED CRIME IN BELGIUM

In the second half of the 1990s, influenced in part by developments in the Netherlands, Belgium too turned its attention to the role of administrative authorities in preventing and tackling organised crime. In 1998 the Parliamentary Commission of Inquiry on Organised Crime, which was set up in the Senate, pointed out the risk of criminal gangs exploiting loopholes in the existing legislation. Not only did the commission think it recommendable, therefore, that the issue of permits, licences and concessions be incorporated into a broader policy, but it at the same time took the view that the fight against organised crime should not only be waged through criminal law, but should also be one of the main responsibilities of local, regional and federal governance.<sup>1</sup> This recommendation was in line with the Action Plan on Organised Crime, which the government had drafted in June 1996 and in which it announced, among other things, the setting up of a Working Group for Administrative Enforcement within the Ministry of the Interior.

Almost two decades later, however, these plans have in fact hardly been implemented. Belgium does not as yet have a specific set of tools nor an institutional framework facilitating an administrative approach to combating organised crime. This does not, however, imply that the administrative authorities – and the municipalities in particular – have no role to play in preventing and combating criminal issues of this kind. First of all, it should be noted that the municipalities have always had a general policing task, in the sense that they are required to maintain public order, public safety and public health. In Section 2.3 of this country report, we shall examine whether and to what extent instruments directed at preventing the disturbance of public order can be used against criminal groups. Special attention will be given to the Mayor's power to order the closure of a place or establishment by means of an administrative police measure.

Secondly, a system of municipal administrative sanctions was introduced by the Law of 13 May 1999, through which the municipalities can develop an effective enforcement policy to deal with breaches of their rules and regulations. This system, reformed by the Law of 24 June 2013, gives the Board of Mayor and Aldermen under certain circumstances the competence to suspend or withdraw a permit or licence on the one hand, and shut

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<sup>1</sup> *Parl.St.* Senaat 1998-99, nr. 1-326/9, p. 511-512.

down an establishment temporarily or even permanently on the other. In Sections 2.2.3 and 2.3.2, we shall discuss the scope of these administrative sanctions and the conditions under which they can be applied.

Thirdly, Belgian legislation provides a number of mechanisms allowing administrative authorities to screen and monitor persons and legal entities. Although these mechanisms were not created to fight organised crime, they can be used in this context. In Section 2.2 of this report we shall demonstrate this by analysing the legal requirements for running a pub, restaurant or hotel. Moreover, we will discuss the gaming licences, the regulation of prostitution and the relevant aspects of public procurement law.

## 2.2 INSTRUMENTS TO SCREEN AND MONITOR PERSONS AND LEGAL ENTITIES

### 2.2.1 *The granting of licences by administrative authorities*

Belgium does not have a general framework by which to refuse licences or subsidies if there are indications of (organised) crime. Nonetheless, for many activities, a licence must be issued by the competent administrative authorities and some form of applicant or licence holder screening is possible in this context. Below, we look in detail at licences needed to run a pub, restaurant or hotel on the one hand and gaming licences on the other.

#### 2.2.1.1 **Licences for pubs, restaurants and hotels**

No general licence requirement applies in the hotel and catering industry, although the Law of 28 December 1983 does impose restrictions on the serving of spirits. In drinking establishments, spirits may not be sold or offered for consumption on the premises without first obtaining a licence from the municipality.<sup>2</sup> The municipality checks the application to ascertain whether or not the drinking establishment operator is subject to any of the legally defined exclusions. The operator of a drinking establishment is the natural person or legal person who, in any capacity and for his own account, carries out an activity relating in part or in full to the operation of a drinking establishment.<sup>3</sup> The municipal authority also checks any agents. The people who live with the operator or agent or live in the establishment and participate in the drinking establishment's operation are also checked.<sup>4</sup>

Persons convicted for a felony cannot become operators of a drinking establishment in which spirits are consumed. The same is true for people convicted of handling stolen goods or one of the offences listed in Chapters IV to VII of Title VII of Book II of the

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2 Article 2 Act of 28 December 1983.

3 Article 1, 2° Act of 28 December 1983.

4 Article 3 § 1, 2° Act of 28 December 1983.

Belgian Criminal Code. Grounds for exclusion also include convictions for running a gaming house or brothel. If the municipal authority refuses to grant the licence, the person concerned can appeal to the Minister of Justice within thirty days. The Minister of Justice or his representative will then judge the appeal.<sup>5</sup>

In regard to some pubs, restaurants and hotels, account should also be taken of the regulations relating to environmental protection, which falls under the Regional competence. In the Flemish Region, this is chiefly the Decree of 28 June 1985 on Environmental Licences, which has taken more specific form through the Decisions of the Flemish Government of 6 February 1991 (VLAREM I) and 1 June 1995 (VLAREM II). On the basis of this legislation, establishments considered a nuisance to man and environment are divided into three classes. The Flemish government determines the list and the class of establishments according to the type and significance of the environmental effects associated with the establishments.<sup>6</sup> Whereas operation or modification of a class 3 establishment merely requires that the Board of Mayor and Aldermen be notified in advance<sup>7</sup>, any operation or modification of a class 1 or 2 establishment requires issue of a written licence by the competent authority in advance<sup>8</sup>. Licence applications for first class establishments are assessed in the first instance by the deputation of the provincial council.<sup>9</sup> The Board of Mayor and Aldermen assesses licence applications for class 2 establishments in first instance.<sup>10</sup>

However, an environmental licence can only be refused on the basis of objective information relating to the nuisance or the risks to the local people and environment. An uneasy feeling among local residents is not, therefore, enough.<sup>11</sup> Concerns of a societal, moral or social nature, or other reasons bearing no relation to the environment, are beyond the discretion of the licensing authority's scope for assessment.<sup>12</sup> In assessing the licence application, the competent authority may not be guided by economic motives – such as anticipated competition – or urban development aspects which do not in themselves relate to the establishment's compatibility with the spatial designation of the area in question.<sup>13</sup>

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5 Article 4 and Article 11 § 1 Act of 28 December 1983.

6 Article 3 Decree of 28 June 1985 (Flemish Region).

7 Article 4 § 2 and Article 9 § 7 Decree of 28 June 1985 (Flemish Region).

8 Article 4 § 1 Decree of 28 June 1985 (Flemish Region).

9 Article 9 § 2 Decree of 28 June 1985 (Flemish Region).

10 Article 9 § 3 Decree of 28 June 1985 (Flemish Region).

11 Raad van State, Verstaappen, nr. 64.584, 18 February 1997.

12 Raad van State, Sint-Niklaas, nr. 71.375, 29 January 1998.

13 Somers 2005, p. 120.

### 2.2.1.2 Gaming licences<sup>14</sup>

#### 2.2.1.2.1 General principles

The Gaming Act of 7 May 1999 imposes a legal framework on games of chance, by which an effective control of all game of chance activities is organised and the potential and undesirable side effects – such as money laundering and forms of tax and financial fraud – are not only identified, but also prevented and counteracted.<sup>15</sup> According to Article 4 § 1 of this Act, the operation of a game of chance or gaming facilities is forbidden without first obtaining a licence from the Gaming Commission. This commission, chaired by a magistrate<sup>16</sup>, was set up by the Ministry of Justice and acts as an advisory, decision-making and supervisory body in the area of games of chance.<sup>17</sup> The Gaming Commission supervises implementation of and compliance with the Gaming Act and its implementing orders and has the task of issuing the necessary licences.<sup>18</sup> The prior, written and non-transferrable<sup>19</sup> licence needed to operate a gaming facility is to be seen as a favour, of which the granting and extension are subject to stringent conditions.<sup>20</sup> If infringements are established, the Gaming Commission may issue warnings, provided it states the reason; suspend or withdraw the licence for a specified period; and impose a temporary or permanent ban on one or more games of chance.<sup>21</sup> Under certain conditions the Gaming Commission also has to the authority to impose an administrative fine.<sup>22</sup>

Gaming establishments are divided into four classes according to: the type and number of games of chance operable in the gaming facilities; the maximum stake, the players' or gamblers' losses and winnings in each game; and the nature of the ancillary activities permissible in the establishment. This concerns casinos (class I), slot machine arcades (class II), drinking establishments (class III) and the establishments exclusively intended for betting (class IV).<sup>23</sup> Since the casinos and slot machine arcades are the most important in the administrative approach to organised crime, in the paragraphs below, we confine our analysis to these gaming facilities.

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14 For a detailed analysis, see Van Daele et al. 2010, p. 156-167.

15 *Parl.St.* Senaat 1997-98, nr. 1-419/4, 24-25.

16 Article 10 Act of 7 May 1999.

17 Article 9 Act of 7 May 1999.

18 See Article 20 and Article 21 Act of 7 May 1999.

19 Article 26 Act of 7 May 1999.

20 *Parl.St.* Senaat 1997-98, nr. 1-419/4, p. 25.

21 Article 15/2 Act of 7 May 1999.

22 See Article 15/3 Act of 7 May 1999.

23 Article 6 Act of 7 May 1999.

#### 2.2.1.2.2 *The operation of a casino*

Casinos are establishments in which on the one hand, games of chance authorized by the King, automated or otherwise, are operated and on the other, socio-cultural activities, such as exhibitions, congresses and catering activities are organised.<sup>24</sup> In Belgium, permission has been granted for only nine casinos.<sup>25</sup> Given that casinos – with or without the operator's knowledge – offer potential as a target for money laundering and other dubious practices<sup>26</sup>, their operation is permissible solely on the basis of a Class A Gaming Commission licence, which is granted for renewable periods of fifteen years and can specify certain conditions.<sup>27</sup> This type of licence can only be issued to a natural person who is a citizen of a Member State of the European Union or to a legal person so defined by Belgian law or the law of another Member State of the European Union.<sup>28</sup>

Natural persons must have full use of their civil and political rights and they must conduct themselves in a manner that befits the requirements of the function. When it is a legal person, these requirements apply to its directors and business managers.<sup>29</sup> An applicant who, in the three-year period preceding his application, has received an effective or conditional prison sentence of six months, does not, according to the Gaming Commission, satisfy the requirements of the function. The same is true of the applicant who has committed an offence in relation to games of chance. In these cases, the commission considers it important that the applicant submit a request for legal rehabilitation before applying for a licence.<sup>30</sup>

The applicant operator of a casino must produce for the Gaming Commission a concession contract concluded with the municipality in question, under the condition that a licence be obtained.<sup>31</sup> He must also produce evidence of his credit worthiness and financial means and is at all times obliged to give the Gaming Commission all the details needed to check the transparency of the operation and the identity of the shareholders, and any later changes to them.<sup>32</sup> This must provide the Gaming Commission with the opportunity to gain insight into the origin of the funds at the applicant's disposal. Any non-accountable origin of funds or doubtful financial operation can lead to a refusal to grant the licence.<sup>33</sup>

24 Article 28 Act of 7 May 1999.

25 See Article 29 Act of 7 May 1999.

26 *Parl.St. Senaat* 1995-96, nr. 1-419/1, p. 2.

27 Article 25, 1) Act of 7 May 1999.

28 Article 31, 1) Act of 7 May 1999.

29 Article 31, 2) Act of 7 May 1999.

30 De Smet & Callu 2008, p. 79.

31 Article 31, 3) Act of 7 May 1999.

32 Article 31, 4) Act of 7 May 1999.

33 *Parl.St. Senaat* 1995-96, nr. 1-419/1, p. 8.

### 2.2.1.2.3 *The operation of a slot machine arcade*

Establishments in which only games of chance authorized by the King are operated are Class II gaming establishments. The maximum number of these so-called slot machine arcades is legally restricted to 180.<sup>34</sup> This restriction is not inconsistent with the Constitution according to the Constitutional Court. Since games of chance exploit a human weakness that can have extremely serious consequences for some people and their families, and so constitute a social hazard, restrictive measures in this area are easier to accept than permissive measures. In the light of the objectives of the Gaming Act on the one hand, *i.e.* social protection coupled with effective control, and in proportion to the size of the national population and in view of profitability considerations on the other, the restriction of slot machine arcades to 180 in number is not unreasonable.<sup>35</sup>

The operation of a slot machine arcade is subject to a Gaming Commission Class B licence, which is issued for renewable periods of nine years and can specify certain conditions.<sup>36</sup> The requirements for obtaining a licence of this type are largely comparable with the requirements for a Class A licence (*supra*, Section 2.2.1.2.2).<sup>37</sup>

A slot machine arcade is operated under a covenant agreed in advance between the municipality in which it is established and the operator. The covenant specifies the slot machine arcade's place of establishment, governing conditions, opening and closing times and opening and closing days. It also states who will exercise municipal supervision over the establishment. Article 34, paragraph 3 of the Gaming Act states that the decision to conclude a covenant falls under the municipality's discretionary competencies. The conclusion of covenants of this type not only strengthens the supervision of these establishments<sup>38</sup>, but also offers the municipalities a degree of policy latitude in relation to their establishment.<sup>39</sup> The Constitutional Court has ruled that this measure appears sufficient to achieve the pursued objective and is not in itself, or in the light of freedom of trade and commerce and freedom of establishment, inconsistent with Articles 10 and 11 of the Constitution. It did, however, stipulate that a municipality's discretionary competence in concluding a covenant remains subject to the rules of supervision and that decisions to grant or refuse a covenant can be legally challenged.<sup>40</sup>

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34 Article 34 Act of 7 May 1999.

35 Arbitragehof nr. 52/2000, 3 May 2000, case nr. 1903. See also Arbitragehof nr. 74/2000, 14 June 2000, case nr. 1941; Arbitragehof nr. 113/2000, 8 November 2000, case nrs. 1991, 1992 and 1998; Arbitragehof nr. 100/2001, 13 July 2001, case nrs. 1903, 1941, 1965, 1987, 1988, 1991, 1992, 1995 and 1998.

36 Article 25, 2) Act of 7 May 1999.

37 See Article 36 Act of 7 May 1999.

38 *Parl.St.* Senaat 1998-99, nr. 1-419/17, p. 138.

39 *Parl.St.* Kamer van Volksvertegenwoordigers 1998-99, nr. 1795/5, p. 12.

40 Arbitragehof nr. 52/2000, 3 May 2000, case nr. 1903; Arbitragehof nr. 74/2000, 14 June 2000, case nr. 1941. See also Arbitragehof nr. 113/2000, 8 November 2000, case nrs. 1991, 1992 and 1998; Arbitragehof nr. 100/2001, 13 July 2001, case nrs. 1903, 1941, 1965, 1987, 1988, 1991, 1992, 1995 and 1998.



The municipality must apply its discretionary power separately for each case and must take account of the information particular to the application. It must, therefore, assess the specific and particular circumstances of the case, and cannot reach the general decision that no covenants will be concluded.<sup>41</sup> The municipality can, however, impose upon itself a rule by which to set the principles it will follow in its assessment of covenant applications. A code of conduct of this type can contribute to the uniform application of the discretionary power, but should not become a fixed, absolutely binding rule. In such a case, the requirement remains that each specific case be assessed separately and on its own merits.<sup>42</sup>

In exercising its competence, the municipality will take account of Article 36, 4) of the Gaming Act. According to this provision, the applicant must ensure that the slot machine arcade is not established in the vicinity of educational institutions, hospitals, places largely frequented by young people, places where services are held, or prisons. The mere circumstance that a slot machine arcade would be established in the vicinity of such protected places is sufficient for the municipality to refuse to conclude a covenant. There is therefore no requirement whatsoever that the municipality demonstrate that the gaming establishment constitutes a real danger.<sup>43</sup>

The municipal discretionary competence provided for in Article 34, paragraph 3 of the Gaming Act is subject to a number of restrictions. On the one hand, it can relate only to aspects which (continue to) resort under municipal competence, particularly the maintenance of public order. Since the Gaming Act gives exhaustive regulations on games of chance, the municipalities no longer have the competence to make decisions themselves based on societal, social or ethical considerations.<sup>44</sup> On the other hand, the municipality's freedom of assessment is bound by reasonableness and by how it exercises its discretionary competence in comparable cases.<sup>45</sup>

## 2.2.2 *The regulation of prostitution*

### 2.2.2.1 **Municipal regulations**

To assure public decency and public peace, the municipal council can, on the basis of Article 121 of the New Municipality Act, establish regulations in addition to the Act of 21 August 1948 abolishing the official regulation of prostitution. The offences determined by these regulations fall under the jurisdiction of the police court.

41 Raad van State, N.V. Pac Man, nr. 100.379, 26 October 2001. See also Raad van State, N.V. Eurogaming, nr. 100.396, 26 October 2001; Raad van State, N.V. Charleroi Automatique, nr. 107.948, 18 June 2002.

42 Raad van State, N.V. Meesy's, nr. 104.314, 5 March 2002.

43 Raad van State, N.V. M.G.C.I., nr. 153.735, 13 January 2006.

44 De Smet & Callu 2008, p. 84-85.

45 Raad van State, N.V. Pac Man, nr. 120.646, 17 June 2003. See also Raad van State, N.V. Eurogaming, nr. 111.892, 24 October 2002.

The municipal council can, for example, impose certain standards on the premises in which prostitutes carry out their activities by means of by-laws. The situation that prostitution can no longer be practised in the same way as previously and/or is subject to certain conditions has no effect on the legality of these regulations. Since a potential disturbance of public decency and public peace is sufficient, there is no requirement that public order already be seriously disrupted as the result of the prostitution.<sup>46</sup> The municipal council also has the competence to determine by means of a municipal police regulation that window prostitution shall be permitted only in a particular territorial area. Furthermore, a maximum number of “prostitution windows” can be determined.<sup>47</sup> Such a policy approach allows the municipalities to attempt to restrict to a minimum the types of nuisance and crime that go hand in hand with prostitution.

Article 121 of the New Municipality Act detracts nothing from the authority to impose tax that is accorded to the municipal council under Article 170 § 4 of the Constitution. Provided the legislator does not prevent the municipalities from levying certain taxes, the municipality may also adopt a regulation by which a tax is imposed on the operators and owners of for example, bars, sex shops or peepshows. Although the primary aim of this tax must be a budgetary measure, it may at a secondary level – taking into account the freedom of trade and commerce – have a discouraging effect on establishments of this kind.<sup>48</sup>

#### 2.2.2.2 The sale of alcohol in brothels

The sale of food or drinks in brothels is punishable under Article 11 of the Legislative Decree of 14 November 1939 by imprisonment of 8 days to 2 months and a fine of 100 to 500 euros. The Mayor can also forbid any sale of alcohol in the houses inhabited by one or more people evidently involved in prostitution, or who have been found guilty of one of the indecency offences provided for in Articles 379 to 382 of the Belgian Criminal Code. Such a ban is effective for two years, but is renewable. Any breach carries a fine of € 50. Repeated breaches carry a prison term of 8 days to 1 month and a fine of € 200.

There is no requirement that the person involved in prostitution be recorded in the municipal register at the address of the premises in question. It is sufficient that this person actually stays at the premises. Nor is there a requirement for the person who operates the establishment to be resident there. Article 11 of the Legislative Decree of 14 November

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46 Hof van Cassatie 9 januari 1996, *Rechtskundig Weekblad* 1996-97, 356, with a case note by M. GELDERS.

47 Raad van State, Vereecke, Manfroid, Busschaerts and cons., nr. 97.535, 6 July 2001; Raad van State B.V.B.A. Piraeus, nr. 97.515, 6 July 2001. See also Lambotte, Muller & Ramelot 2004, p. 64-65; Lust 25 September 2002, p. 14.

48 Raad van State, V.Z.W. Espace P, De Ridder and cons., nr. 114.119, 23 December 2002; Raad van State, Vandenplas, Vanhoegaarden and Eggermont, nr. 129.174, 12 March 2004. See also Lambotte, Muller & Ramelot 2004, p. 73-74.

1939 merely provides the basis on which to ban the sale of alcohol and does not allow municipal authorities to ban all commercial activity in the premises in question.<sup>49</sup>

Cases of urgency aside, the ban on the sale of alcohol can only be imposed after the person in question has been given the opportunity to state this arguments. It does not necessarily follow from this that the Mayor must hear a statement from the person in question. It is sufficient that he be aware of the position taken by the person in question. If the ban is based on the conclusion that the house in question is inhabited by one or more people evidently involved in prostitution, the Mayor need not, for that matter, withhold his decision until a verdict has been given regarding charges made against the person in question.<sup>50</sup>

### 2.2.3 *The suspension and withdrawal of licences as administrative sanctions*

#### 2.2.3.1 **Legal basis**

By virtue of Articles 2 § 1 and 4 § 1, 2° and 3° of the Act of 24 June 2013 concerning municipal administrative sanctions, the municipal council can determine that a breach of a municipal rule or municipal regulation is sanctioned, on the one hand, by the administrative suspension of a permit or licence issued by the municipality or, on the other, by the administrative withdrawal of any such permit or licence. However, in this context the term “withdrawal” (*intrekking*) is rather an unfortunate choice, because under Belgian law it refers to the implicit or explicit legal act by which an administrative authority rescinds its own decision *ab initio* and with retroactive effect. The permit or licence is then considered never to have existed, which is certainly not the intention here. This is because imposing a sanction retroactively is inconsistent with the ban on giving administrative measures retroactive effect. Moreover, it is impossible to see how someone might be sanctioned for a period in which no breach was committed, or at least alleged. Hence, it is not a withdrawal, but a revocation (*opheffing*) of a permit or licence granted, by which it loses its legal authority in the future, yet the legal consequences of the past continue to exist.<sup>51</sup>

The suspension and revocation of a permit or licence are administrative sanctions. It is a legally defined measure of a repressive nature, imposed by an administrative body by means of a unilateral, individual administrative measure, in response to a breach of a legal standard.<sup>52</sup> Application of these sanctions implies that the activity to which the permit or activity relates must cease, either temporarily (in the case of suspension) or permanently

49 Raad van State, D’Haese, nr. 86.128, 21 March 2000.

50 Raad van State, D’Haese, nr. 86.128, 21 March 2000.

51 Boes 2000, p. 124-125.

52 Put 2001-2002, p. 1196. See also Veny, De Geyter & Vandendriessche 1999-2000, p. 159.

(in the case of revocation).<sup>53</sup> These sanctions are imposed by the Board of Mayor and Aldermen.<sup>54</sup>

The Board of Mayor and Aldermen will not be able to proceed preventively with the suspension or revocation of a licence or permit. There will have to have been, therefore, a breach of a municipal rule or municipal regulation, where it is also a requirement that the rule or regulation in question state these sanctions explicitly.

#### **2.2.3.2 Scope**

The suspension and revocation are applied to a permit or licence granted by the municipality. A licence can be described as an administrative decision with individual effect which is made by request and by which an exception is made to a general ban established on the strength of regulations. In many cases a licence can be dependent on certain conditions to be satisfied by the holder. Non-compliance with these conditions can be a good reason for suspending or revoking the licence. This does, however, raise the question of what exactly distinguishes a licence on the one hand from a permit or permission on the other. Indeed, a permit or permission seems also to concern a decision by which, in an individual case, an exception is made to a general ban.<sup>55</sup>

Suspension and revocation can only be applied to licences and permits that have their legal basis in a municipal rule or municipal regulation. The Board of Mayor and Aldermen does not have the competence to revoke licences which, though issued by municipal bodies, have their legal basis in a non-municipal regulation. The municipality cannot, for example, suspend or revoke an environmental licence that it has granted, because the licence is given by virtue of the Decree of 28 June 1985 on Environmental Licences.<sup>56</sup>

#### **2.2.3.3 Procedure**

##### *2.2.3.3.1 Prior notice*

The Act of 24 June 2013 contains no fully developed procedure covering the administrative suspension or revocation of a permit or licence granted by the municipality. It does, however, specify that these administrative sanctions are imposable only after the offender has received notice containing a statement of the relevant passages from the rule or regulation that was breached.<sup>57</sup> This gives the offender the opportunity to remediate the situation, and the time that he is given must be sufficient for him to comply. The length of this

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<sup>53</sup> Billiet 2005, p. 102-103.

<sup>54</sup> Article 45 Act of 24 June 2013.

<sup>55</sup> Billiet 2005, p. 102.

<sup>56</sup> For other examples, see Van Daele et al. 2010, p. 207.

<sup>57</sup> Article 45 Act of 24 June 2013.

period will depend on the nature of the breach and the time reasonably needed by the party in question to rectify the situation at reasonable cost.

There is provision, for the remainder, that the municipal council may decide the method by which the person in breach is notified of the suspension or revocation of the licence or permit.<sup>58</sup> Although no further regulations are specified on the right of the person in question to present a defence, account should be taken of the general principles of good governance, in the light of the case law of the Council of State. This aspect is discussed in the paragraphs that follow.

#### 2.2.3.3.2 *Hearing of the person concerned*<sup>59</sup>

Before the Board of Mayor and Aldermen suspends or revokes a licence or permit, it is required to grant the holder a hearing. According to the Council of State, the administration cannot take a serious measure against anyone that is based on their personal conduct and that seriously affects their interests, before first giving them the opportunity to effectively make their position known. This obligation to grant a hearing affords the person concerned the opportunity to put forward his arguments in relation to the facts and the proposed measure and so prevent the making of a decision that would disadvantage him. The obligation to grant a hearing is also in the best interests of the administration. In this sense, the obligation rests on the principle of carefulness in examining the facts, according to which the administration may only reach a decision after an adequate examination of the case and having appraised all the relevant information.<sup>60</sup>

Although the scope of the obligation to grant a hearing depends on the factual circumstances of the case, the administrative authority will naturally invite the person concerned to state his case. Since the person concerned requires knowledge of the facts to defend his interests, he must be informed beforehand of the essential information on which the administration will base its decision. The administration must, for example, notify the person concerned of the measure it proposes to take against him, in which case the circumstantial and legal basis for the measure must be clearly stated. The charges must also be stated fully and precisely.<sup>61</sup> The person concerned must, therefore, be given the opportunity to make known his position on the specific circumstances that gave rise to the proposed measure. In cases where the administration has a choice between different measures, it is additionally required that the person concerned be given a hearing on the nature and stringency of the measure under consideration. This will afford him the opportunity to

<sup>58</sup> Article 45 Act of 24 June 2013.

<sup>59</sup> For a detailed analysis, see Mareen 2005, p. 189-197.

<sup>60</sup> Opdebeek 2006, p. 235-236 and 242.

<sup>61</sup> See Opdebeek 2006, p. 264-268.

attempt to persuade the administration to take a less drastic measure than the one under consideration.<sup>62</sup>

When preparing his defence, the person in question has, in principle, the right to view the entire case file, and so he must also be given a reasonable period of time in which to prepare his defence. This is assessed on a case-by-case basis, in which account must be taken of matters such as the complexity of the case, the gravity of the measure under consideration and the urgency of the intervention.<sup>63</sup> Although the obligation to grant a hearing does not extend to allowing the person in question to demand the right to consult a lawyer and, in so doing, to postpone the decision by that amount of time, this does not alter the fact that he must be given at least the time needed to form an opinion on all the information that the administration has brought to his attention. Depending on the urgency with which the administration wishes to make a decision, it can keep this term short, provided it gives prior notice to the person concerned.<sup>64</sup>

The person concerned is entitled to assistance or representation by a lawyer during his oral hearing. To prevent disputes, it is recommended that the administration keeps a report of the hearing and asks the person concerned to sign it as true. Contrary to what the term 'obligation to grant a hearing' might lead us to believe, the person concerned need not necessarily be heard orally. It is sufficient that he be given the opportunity to state his case in writing. It is, however, a requirement that the adjudicating body be in a position to take cognisance of the viewpoint of the person concerned at the time of taking the decision. The final decision can, therefore, refer to written documents provided by the person concerned.<sup>65</sup>

Finally, it should be noted that the obligation to grant a hearing does not always apply as a matter of course. A departure can be made from the obligation, for example, if the person concerned cannot be contacted within a reasonable period of time. This unavailability must, however, be demonstrated by specific indications. Furthermore, the obligation to grant a hearing does not apply where the circumstances allow a direct, straightforward establishment of the facts by the administration and, therefore, no further examination is required. Indeed, hearing the person concerned might not, in such a case, contribute to the meticulousness with which the facts are examined. If, in the case of firmly established facts, the administration has a choice between different measures, it will, however, be obliged to hear the person concerned on the subject of the measure it proposes to take.<sup>66</sup> Therefore, the administration is only released from the obligation to grant a hearing if the

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62 Raad van State, De Proft, nr. 78.360, 26 January 1999.

63 See Opdebeek 2006, p. 269-271.

64 Raad van State, Van Trappen, nr. 84.551, 6 januari 2000. See also Raad van State, Burhanettin, nr. 91.803, 21 december 2000.

65 Opdebeek 2006, p. 269 and 271-273.

66 See Opdebeek 2006, p. 250-254 and 272.

circumstances on which the measure rests are well grounded and the disadvantageous measure is the logical consequence of this.<sup>67</sup> Finally, the person in question need not be granted a hearing if he has already been heard in respect of an earlier decision or by another administrative authority, and no new circumstances have since then arisen.<sup>68</sup>

#### 2.2.3.3.3 *Proportionality principle*

When imposing an administrative sanction, the Board of Mayor and Aldermen must bear in mind the proportionality principle, which is a specific application of the more general principle of reasonableness<sup>69</sup> and relates to the result of the authority's weighing up of the interests. The restriction or sanction imposed on the person concerned must not, for example, be disproportionate to the charge made against him or the envisaged purpose of the standard applied in the specific case.<sup>70</sup>

#### 2.2.3.3.4 *Duty to state grounds*<sup>71</sup>

The administration must give the grounds for its decisions, so that the person concerned understands the underlying motives and is in a position to investigate the regularity of the administrative measure. This duty to state grounds is also in the best interests of the administration, since it guarantees a thorough and careful investigation and enhances the quality of the decision-making.<sup>72</sup> There are two aspects to the duty to state grounds. On the one hand, there is the material obligation to provide grounds of justification, meaning that every administrative measure must rest on sound reasoning. It must rest on grounds whose circumstantial existence is adequately demonstrable and that provide a legal basis for the legal action in question. On the other hand, there is the formal obligation set out in the Act of 29 July 1991, under which the material grounds must be stated in the administration's decision. Unilateral legal actions issued by an administration, which have an individual effect and purport to have legal consequences for one or more governed person, must be explicitly reasoned. This justification must state the legal and circumstantial considerations underpinning the decisions and must also be conclusive.<sup>73</sup>

#### 2.2.3.4 **Legal remedies**

The decision by the Board of Mayor and Aldermen to administratively suspend or revoke a licence or permit is enforceable immediately and is presumed legal. The Act of 24 June 2013 provides no specific appeal procedure in relation to this decision. On the grounds of

67 Raad van State, De Proft, nr. 78.360, 26 January 1999.

68 See Opdebeek 2006, p. 254-255.

69 Boes 1993, p. 104.

70 Berx 2000, p. 386-387.

71 For a detailed analysis, see Mareen 2005, p. 165-188.

72 Berx 2000, p. 424-425.

73 See Mareen 2006, p. 140-141.

a breach of substantive forms or forms prescribed under penalty of nullity, breach of power or abuse of power, the person concerned can, however, appeal to the Administrative Litigation Section of the Council of State to have the decision annulled.<sup>74</sup> If an action by an administrative authority is liable to annulment, it is the Council of State that is authorised to order suspension of the enforcement. A suspension of this type will only be possible, however, on the condition that serious arguments have been put forward that could warrant the decision's annulment on the one hand, and that its immediate enforcement could cause the person concerned a serious disadvantage that would be difficult to remedy on the other.<sup>75</sup>

#### 2.2.4 *The suspension of a licence as an order preservation measure*

In some cases, the failure to observe the conditions of the licence can take on such proportions that rapid action is needed. In such emergencies, there is no need to wait for a decision by the Board of Mayor and Aldermen, for the competence to act is invested in the Mayor.<sup>76</sup> If the conditions of a licence are not fulfilled, the Mayor can temporarily suspend the licence on the grounds of Article 134ter of the New Municipality Act. This is not an administrative sanction, but an order preservation measure, which is not designed to penalise the person concerned, but to maintain order.<sup>77</sup>

This competence is not restricted to licences granted by the municipality, but may also apply when an establishment is operated under a licence issued by another authority.<sup>78</sup> It is the case, however, that the Mayor may only act if the competence to order a temporary licence suspension does not fall to another authority by special regulation.

The temporary suspension of a licence is only possible if any further delay might cause serious harm. This serious harm should be understood as a serious disturbance of public order caused because the person concerned did not abide by the regulations applicable to him.<sup>79</sup> The offender must also first be given the opportunity to present his defence. Although this has no legal grounding, it can be assumed that the Mayor's decision must be in writing and bear his signature. The decision must then be handed to the person concerned or sent by registered letter.<sup>80</sup> Account must also be taken of two restrictions. Firstly, the suspension lapses immediately if not ratified at the next meeting of the Board of Mayor and Aldermen.

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74 Article 14 § 1 Council of State Act of 12 January 1973.

75 See Article 17 Council of State Act of 12 January 1973.

76 *Parl.St. Kamer van Volksvertegenwoordigers* 1998-99, nr. 2031/1, p. 7.

77 *Parl.St. Kamer van Volksvertegenwoordigers* 2002-2003, nr. 2366/001 en 2367/001, p. 22.

78 Point 46 Circular OOP 30bis from 3 January 2005.

79 Vandendriessche 2001, p. 186.

80 See point 45 Circular OOP 30bis from 3 January 2005.



Secondly, the suspension is impossible for a maximum of three months. When this term expires, the Mayor's decision ceases to have legal effect.

### 2.2.5 *Public procurement law*

Article 45, paragraph 1 of Directive 2004/18/EC, which provides several cases of mandatory exclusion from participation in a procurement procedure, and so aims to prevent government contracts from being awarded to contractors who have been involved in organised crime or found guilty of certain other offences, was transposed into Belgian law by Article 20 of the Act of 15 June 2006 on government contracts and certain public works, supply and services contracts. Access to government contracts is thus denied to any candidate or applicant who has been convicted for participation in a criminal organisation, corruption, fraud or money laundering. It is, however, a requirement here that the conviction rest on a final court judgement of which the contracting authority is aware. This raises the question of how the contracting authority can be aware of that judicial decision. Belgian law only provides in this regard that – if there is doubt on as to the personal situation of the contractor, supplier, or service provider – the contracting authority can request information from the competent Belgian or foreign authorities.

The mandatory exclusion may be departed from on grounds in the general interest. In some situations, such as when a monopoly exists, the contracting authority may, for example, be forced to award a contract to a company in default, to prevent even greater harm.<sup>81</sup>

Account must further be taken of Article 4 § 1, 4°, a) of the Act of 20 March 1991 concerning the regulation of the accreditation of works contractors. According to this provision, a contractor can only obtain accreditation if he has not been convicted, by final judgement, of one of the four criminal offences listed above, of a terrorist offence or of any other offence that breaches his professional ethics. To obtain accreditation the contractor must also have fulfilled his social security and tax obligations.<sup>82</sup>

81 *Parl.St.* Kamer van Volksvertegenwoordigers 2005-2006, nr. 2237/001, 36; Van Daele et al. 2010, p. 168.

82 Article 4 § 1, 7° Act of 20 March 1991.

## 2.3 INSTRUMENTS DIRECTED AT PREVENTING THE DISTURBANCE OF PUBLIC ORDER

### 2.3.1 *Municipalities and the maintenance of public order*

At the municipal level, the municipal council is entrusted with the statutory power in relation to the maintenance of public order. According to Article 119, paragraph one of the New Municipality Act, the municipal council creates the municipal rules of internal governance and the municipal by-laws. These rules and regulations have general scope and apply across the territory of the municipality.<sup>83</sup> Whereas the rules of internal governance relate to the internal organisation of municipal services and the material interests of the municipality, the by-laws relate to the maintenance of public order and affect the general interest.<sup>84</sup> The by-laws are essentially preventive measures to preserve public order in the municipality and are therefore designed to prevent the disturbance of public order and/or to restore order. These measures can also include rules – including prohibitive orders – in relation to activities performed outside the public domain.<sup>85</sup> The municipal council will, however, in its by-laws, have to indicate clearly and precisely the measures required to maintain public order.<sup>86</sup>

Since municipal rules and regulations must not be inconsistent with the higher legal standards, the municipal council's statutory competence is not in any sense unrestricted. Firstly, the municipal council does not have statutory competence (any longer) when a higher authority has legislated in a specific matter with a view to preserving public peace, safety or health<sup>87</sup>, unless this special legislation leaves explicit or implicit room for action at the municipal level. When a higher authority issues a systematic, conclusive and exhaustive regulation, the municipalities themselves no longer have any power of enactment.<sup>88</sup> Secondly, the municipal council cannot overrule or abolish a constitutional or legally guaranteed right. It can, however, subject the exercise of such a right to certain restrictions, if so required to maintain public order. But when drafting by-laws, the municipal council does have to weigh up the interests of individual freedom against the

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83 Van Speybroeck 2005, p. 19.

84 Lambrechts 1962-63, p. 572; Muylle & Serlippens 1998, p. 47.

85 Raad van State, B.V.B.A. Ramses, nr. 83.940, 7 December 1999; Raad van State, De Proft, nr. 90.369, 24 October 2000.

86 Raad van State, B.V.B.A. Golf Practice Club, nr. 58.673, 20 March 1996.

87 Van Speybroeck 2005, p. 18.

88 Dujardin, Somers & Van Summeren 2009, p. 393; Lambrechts 1962-63, p. 574-575; Vandendriessche 2001, p. 170-172.

maintenance of order. This weighing up of interests may then be examined by the Council of State in specific cases.<sup>89</sup>

When examining the compatibility of a municipal by-law with individual freedom, the Council of State first ascertains whether there is any specific information to demonstrate that public order has actually been disturbed or is in danger of being disturbed, in which context it also looks at how serious the disturbance is and precisely where it is taking place. The Council of State then looks at the actual by-law and considers three questions. In the first place, there is the requirement that the by-law tie in with the category of measures employable to counter the dreaded disturbance of public order. Secondly, from the wider perspective of all methods available to the municipality for the maintenance of public order, the by-law must be necessary or indispensable, *i.e.* the least drastic. And thirdly, freedom must not be interfered with any more than is necessary. No needless restriction, disproportionate to the gravity of the disturbance of public order, is to be placed on the people who are to bear the weight of the measure.<sup>90</sup>

### 2.3.2 *The closure of an establishment as an administrative sanction*

The municipal council can determine that a breach of a municipal rule or municipal regulation is sanctioned by the establishment's temporary, even permanent closure.<sup>91</sup> This administrative sanction is imposed by the Board of Mayor and Aldermen.<sup>92</sup>

An establishment can only be closed if it is operated contrary to either the conditions stipulated in the licence or permit issued by the municipality, or – beyond any licence or permit – the conditions directly imposed by a municipal rule.<sup>93</sup> In the first case, the licence or permit will naturally be suspended or revoked (*supra*, Section 2.2.3), meaning that the licensed establishment or activity will in any case have to be closed or discontinued. The sanction of closure will, therefore, only be necessary in the case of establishments that are operated without a municipal licence or permit, but are subject to a municipal rule.<sup>94</sup>

In terms of procedure the same rules apply as those for the suspension and revocation of a licence as an administrative sanction (*supra*, Section 2.2.3.3). The temporary or permanent closure of an establishment is only possible, therefore, following prior notification.

89 Raad van State, B.V.B.A. Ramses, nr. 83.940, 7 December 1999; Raad van State, De Proft, nr. 90.369, 24 October 2000. See also Raad van State, Snellings and Agalev, Gemeentelijke groep Leuven, nr. 103.730, 19 February 2002.

90 Raad van State, B.V.B.A. Ramses, nr. 83.940, 7 December 1999; Raad van State, De Proft, nr. 90.369, 24 October 2000. See also Raad van State, Snellings and Agalev, Gemeentelijke groep Leuven, nr. 103.730, 19 February 2002.

91 Article 2 § 1 and Article 4 § 1, 4<sup>e</sup> Act of 24 June 2013.

92 Article 45 Act of 24 June 2013.

93 *Parl.St.* Kamer van Volksvertegenwoordigers 1998-99, nr. 2031/4, 18; De Somere et al. 2005, p. 96.

94 Boes 2000, p. 126.

The obligation to grant a hearing, the proportionality principle and the obligation to state the grounds must also be honoured. Furthermore, an appeal against the closure decision can be lodged with the Administrative Litigation Section of the Council of State.

### 2.3.3 *The closure of a place or establishment as an administrative police measure*

Rapid action may be recommended when it comes to the closure of an establishment. In this case, account should be taken of a range of powers accorded to the Mayor, which we will analyse in the following paragraphs.

#### 2.3.3.1 **Non-fulfilment of operating conditions**

##### 2.3.3.1.1 *Scope*

If an establishment's operating conditions are not fulfilled, the Mayor can, on the grounds of Article 134<sup>ter</sup> of the New Municipality Act, proceed with the closure of the establishment in question. These operating conditions may have been determined by the municipality or by another authority.<sup>95</sup> But a closure is only possible if any further delay could cause serious harm. There must, therefore, be reason to assume a serious disturbance of public order, arising from the circumstance that the person involved has not fulfilled the regulations applicable to him.<sup>96</sup>

##### 2.3.3.1.2 *Procedure*

The provisional closure of an establishment on the grounds of Article 134<sup>ter</sup> of the New Municipality Act is an order preservation measure which envisages no more than the maintenance of public order and is not designed to be punitive to the person concerned. It is not, therefore, an administrative sanction<sup>97</sup>, but a specific competence of the Mayor, which can be distinguished from his general authority to maintain public order in specific cases.<sup>98</sup> In contrast to an administrative sanction, the measure can be taken at any time and there is no requirement that it be covered by a by-law.<sup>99</sup>

Prior to a closure decision, the offender must be offered the opportunity to present his defence. The temporary closure decision should be preferably made in writing and signed by the Mayor. Given that this decision is an administrative act in the sense of the Act of 29 July 1991, it must be materially and formally reasoned (*supra*, Section 2.2.3.3.4). The

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<sup>95</sup> Astaes et al. 2003, p. 272; Van Bol 2002, p. 25.

<sup>96</sup> Vandendriessche 2001, p. 186.

<sup>97</sup> *Parl.St.* Kamer van Volksvertegenwoordigers 2002-2003, nr. 2366/001 en 2367/001, p. 22.

<sup>98</sup> Raad van State, B.V.B.A. Horex, nr. 82.188, 6 September 1999.

<sup>99</sup> Van Garsse 2001, p. 145.

decision is handed to the person in question or sent to him by registered letter. The temporary closure must also be ratified at the next meeting of the Board of Mayor and Aldermen. Otherwise, the measure lapses with immediate effect.

#### 2.3.3.1.3 *Duration of the closure*

On the grounds of Article 134<sup>ter</sup> of the New Municipality Act, an establishment can be closed down for a maximum term of three months. When this term expires, the Mayor's decision ceases to have legal effect.

### 2.3.3.2 **Disturbance of public order around an establishment**

#### 2.3.3.2.1 *Scope*

By virtue of Article 134<sup>quater</sup> of the New Municipality Act, the Mayor can, under certain conditions, proceed to the temporary closure of an establishment that is open to the public, such as a café, a discotheque or a late night shop. Since this competence is limited to places that are open to the public, it does not give grounds to clear and close a private residence.<sup>100</sup> It should be stated here that the hotel room in which a person is staying does indeed have the character of a residence, in the sense of the legislation on house searches and Article 26 of the Police Service Act, but that from this it does not follow that the hotel as a whole must be considered as a residence. Hotel rooms rented for a few hours, or even for long periods, with a view to prostitution – and so not for real residence – are not in any way, therefore, excluded from the scope of Article 134<sup>quater</sup> of the New Municipality Act. The circumstance that customers can only enter after ringing the bell, and that they pay for the room in advance, does not alter this.<sup>101</sup>

A closure is possible if a disturbance of public order around a publicly open establishment is the result of conduct in that establishment. The requirement here is that the disturbance of public order takes place outside the establishment, *i.e.* on the public highway. If it is only a matter of a disturbance in – and therefore not outside – the establishment, this competence cannot be put to effect.<sup>102</sup>

Although it is not necessary for the conduct to be illegal in character<sup>103</sup> or for the operator of the establishment to have committed an offence themselves<sup>104</sup>, a literal interpretation of Article 134<sup>quater</sup> of the New Municipality Act implies that a closure can only be applied in cases where the disturbance of order results from conduct that takes place in the establishment itself. Consider, for example, cases of excessive noise or disturbing

100 *Parl.St.* Kamer van Volksvertegenwoordigers 1998-99, nr. 2031/4, p. 11.

101 Raad van State, Van Trappen, nr. 85.022, 1 February 2000.

102 Point 49 Circular OOP 30bis from 3 January 2005.

103 Point 50 Circular OOP 30bis from 3 January 2005.

104 Boes 2000, p. 141.

rays of light from a discotheque.<sup>105</sup> If the disturbance of the public order is not related to conduct in the establishment – for example the noise caused by private individuals entering or leaving the establishment – it would not be possible to proceed with a closure.<sup>106</sup>

Nonetheless, the Council of State interprets the requisite link between disturbances of the public order and conduct inside the establishment broadly and accepts that the Mayor may close an establishment if he is able to demonstrate, firstly, that the public order in a given neighbourhood is disturbed and, secondly, that the cause of the disturbance can be traced to activities in the establishment concerned.<sup>107</sup> Since this type of link will suffice, it is not necessary for the disturbance of public order to have actually arisen from conduct in the establishment. A neighbourhood's public order can therefore be disturbed, for example, by the presence of prostitutes who recruit their customers on the street before taking them to a hotel. Although in this case the disturbance of the public order does not arise from the activities in the hotel itself, the Mayor can, nonetheless, close down such a hotel. This is because there is a link between the hotel and the disturbance of the public order.<sup>108</sup> It must, however, be an actual disturbance of the public order as such. A limited public nuisance will not suffice.<sup>109</sup>

#### 2.3.3.2.2 *Procedure*

The closure of an establishment that is open to the public is an order preservation measure and not an administrative sanction. Indeed, the final outcome of the measure is to maintain the public order and in no sense whatsoever to sanction the person concerned.<sup>110</sup> Here once again, there is an obligation to grant a hearing, meaning that the Mayor will first have to give the person concerned the opportunity to present his defence. The person concerned must therefore be given the opportunity to put forward his arguments, in writing or orally, to the Mayor or an official delegated by the latter.<sup>111</sup> In an urgent case, it is also acceptable that the Mayor temporarily close down an establishment open to the public without first granting the operator concerned a hearing. In this case the closure must, however, be confined to a few hours.<sup>112</sup>

It is recommended that the Mayor gives his decision in writing and lend his signature to it. The decision must then be handed to the person concerned or sent to him by regis-

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105 For other examples, see Goffaux & Gosselin 2007, p. 356-357.

106 Point 49 Circular OOP 30bis from 3 January 2005.

107 Raad van State, Van Trappen, nr. 85.022, 1 February 2000.

108 Boes 2000, p. 143.

109 Point 49 Circular OOP 30bis from 3 January 2005.

110 *Parl.St.* Kamer van Volksvertegenwoordigers 2002-2003, nr. 2366/001 en 2367/001, p. 22. See also Goffaux & Gosselin 2007, p. 353; Plas 1999, p. 53; Van Garse 2001, p. 145.

111 Point 51 Circular OOP 30bis from 3 January 2005. See also Van Daele et al. 2010, p. 234-235.

112 Point 51 Circular OOP 30bis from 3 January 2005.

tered letter.<sup>113</sup> As an administrative act in the sense of the Act of 29 July 1991, the Mayor's decision must satisfy the material and formal obligation to state the grounds for the decision (*supra*, Section 2.2.3.3.4). The temporary closure of the establishment concerned must be clearly reasoned, on the basis of a properly substantiated file of complaints in relation to the disturbance of the public order. In this perspective, it is recommended that the Mayor have a report compiled by a police service or other service, on which to base the public order disturbance.<sup>114</sup> The mere statement of a breach in a police report will not necessarily suffice as proof of the breach. The Mayor must also check whether the person in question is aware of the police report and must moreover give him the opportunity to put forward his case.<sup>115</sup> This does not alter the fact, however, that an administrative measure to restore the public peace and order – such as an order to shut down a public house – can in fact be implemented on the basis of police reports on which the criminal court has not yet passed judgement. In such a case, it is up to the Mayor himself to decide the value to be placed on the observations of the officials who have submitted the reports.<sup>116</sup>

Since the power of closure rests directly on Article 134*quater* of the New Municipality Act, it is not a requirement that the infringement or conduct leading to the Mayor's decision be covered by a police regulation.<sup>117</sup> But the decision must be ratified at the next meeting of the Board of Mayor and Aldermen. Otherwise, the measure ceases with immediate effect.<sup>118</sup>

#### 2.3.3.2.3 *Duration of the closure*

The closure of the establishment is only temporary and applies for the term set by the Mayor, on the understanding that the maximum term shall be three months. On expiry of this term the Mayor's decision is rescinded by law.<sup>119</sup> It cannot be ruled out, however, that on expiry of the term of closure, the Mayor issues a new closure order. Needless to say, it will have to be demonstrated that the maintenance of the public order still requires such a measure.<sup>120</sup>

The proportionality principle (*supra*, Section 2.2.3.3.3) implies that the duration of the closure must be proportionate to the nuisance caused, and the assessment of this must be clear from the formal statement of the grounds for the decision.<sup>121</sup> There is nothing to say

113 See point 45 Circular OOP 30*bis* from 3 January 2005.

114 Points 51-52 Circular OOP 30*bis* from 3 January 2005.

115 Raad van State, Athanassiadis, Pavlidis and S.P.R.L. Taverne Restaurant Champs Elysées, nr. 78.834, 19 February 1999.

116 Raad van State, Gryspeerdt en B.V.B.A. Cavalli Jewels, nr. 68.125, 16 September 1997.

117 Raad van State, Daems, nr. 161.353, 14 July 2006.

118 Article 134*quater*, paragraph 2 New Municipality Act.

119 Article 134*quater*, paragraph 1 and 3 New Municipality Act.

120 Vandendriessche 2001, p. 187.

121 Raad van State, Vandenoord, nr. 132.094, 8 June 2004.

that the Mayor would always opt for the maximum duration of three months closure.<sup>122</sup> The fear that the disturbance of public order would reoccur after a short closure and that as a consequence the Mayor would not have shown himself to be firm enough is insufficient in any case. If an initial closure does not have the desired effect, there is nothing to prevent the Mayor from immediately ordering a new closure.<sup>123</sup> Furthermore, the Mayor will also have to give adequate justification of his choice of a full closure – as the strictest possible measure – and why a less radical measure, that would allow the operator to continue to operate without causing a public nuisance, would not be sufficient.<sup>124</sup> These less radical measures might entail increasing the frequency of police checks, giving the operator a warning or imposing an imposed reduction of the opening hours.<sup>125</sup>

The Mayor must also take account of the establishment operator's (lack of) cooperation and any initiatives already taken or planned by the latter to restore the public order.<sup>126</sup> If, however, there is however considerable disorderliness around a drinking establishment, and the Mayor can demonstrate that every other means possible – such as prevention, supervision, consultation and a closing time – has been employed to improve the situation without the desired effect, a closure of three months may well be seen as a proportionate measure.<sup>127</sup>

### 2.3.3.3 Disturbance of public order in an establishment

Article 134 *quater* of the New Municipality Act, which we analysed in the paragraph above, was introduced by the Act of 13 May 1999. Whereas prior to this Act, the Mayor could close an establishment that is open to the public on the basis of the general power to maintain public order<sup>128</sup> invested in him under Articles 133 and 135 § 2 of the New Municipality Act, his power on this point is currently more limited, contrary to the Legislator's intentions.<sup>129</sup> If the Mayor wishes to close down an establishment open to the public due to a disturbance of public order that takes place around this establishment and is caused by conduct in the establishment, he must by necessity rely on Article 134 *quater* of the New Municipality Act. The strict conditions in this provision can therefore not be

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122 Point 52 Circular OOP 30*bis* from 3 January 2005.

123 Raad van State, Ketelaars, nr. 138.582, 16 December 2004. See also Raad van State, Boone, nr. 132.280, 10 June 2004.

124 Raad van State, B.V.B.A. Horex, nr. 82.276, 16 September 1999. See also Raad van State, GCV Jogy, nr. 143.310, 18 April 2005.

125 Steelandt 1988, p. 82; Vander Beken 1993-94, p. 744.

126 Raad van State, B.V.B.A. Hereijgers and De Villa, nr. 183.750, 3 June 2008. See also Raad van State, Daems, nr. 161.353, 14 July 2006.

127 Raad van State, Burhanettin, nr. 91.803, 21 December 2000.

128 See Van Daele et al. 2010, p. 214-215.

129 Bouvier 2007, p. 341-342; Goffaux & Gosselin 2007, p. 354-356.



circumvented by drawing on the general competence to maintain order.<sup>130</sup> In this sense, Article 134*quater* of the New Municipality Act must also be considered as a *lex specialis*, which limits Articles 133 and 135 § 2 of the New Municipality Act as *lex generalis*.<sup>131</sup>

In other respects, the Mayor's general competence continues to apply. In the cases that do not fall under the scope of Article 134*quater* of the New Municipalities Act, the Mayor can still close down an establishment that is open to the public on the basis of his general power. This would include the situation in which the public order is disturbed only inside – and not around – the establishment.<sup>132</sup> It would also include cases in which there is merely a potential – and not an actual – disturbance of public order around the establishment.<sup>133</sup> In such cases, the Mayor is not bound by the strict conditions in Article 134*quater* of the New Municipality Act and can, for example, impose a closure longer than three months. The principle of reasonableness involves, however, that the Mayor must weigh up public interests against the interests of the operator in keeping the business open.<sup>134</sup> Furthermore, Articles 133 and 135 § 2 of the New Municipality Act offer no basis for a closure by way of sanction.<sup>135</sup>

### 2.3.3.4 Infringements of the drug legislation

#### 2.3.3.4.1 Scope

On the basis of Article 9*bis* of the Drugs Act of 24 February 1921, the Mayor may decide to close a place which is private, yet open to the public. Given the effect of this closure measure on the operator in question's freedom of trade and commerce, its application must be confined to cases of serious violations of the drug legislation. This is aimed at pubs, bars, discotheques and other places of entertainment in which drugs are trafficked repeatedly and on a considerable scale.<sup>136</sup>

The closure will only be possible if there are serious indications that repeated illegal activities relating to the sale, supply or facilitation of the use of drugs are taking place in the premises concerned. Furthermore, these activities must also constitute a threat to public safety and peace. In practice, the serious indications required will often come to

130 Raad van State, B.V.B.A. Horex, nr. 82.188, 6 September 1999. See also Raad van State, V.Z.W. Integratiecentrum Het Zand Lokeren, nr. 134.006, 19 July 2004; Raad van State, B.V.B.A. Benstine, nr. 134.007, 19 July 2004.

131 Boes 2000, p. 145.

132 De Somere et al. 2005, p. 106; Van Speybroeck 2005, p. 26.

133 Astaes et al. 2003, p. 275; De Somere et al. 2005, p. 106.

134 Raad van State, Rosciano, nr. 119.016, 6 May 2003; Raad van State, Rosciano, nr. 133.645, 8 July 2004. See also Raad van State, B.V.B.A. El Gringo, nr. 112.581, 15 November 2002.

135 Raad van State, Sicurella, nr. 64.452, 7 February 1997.

136 *Parl.St.* Kamer van Volksvertegenwoordigers 2005-2006, nr. 2518/001, p. 45-46.

light as a result of large-scale police operations, in the form of raids, house searches and seizures. They may also arise, however, from successive, smaller checks.<sup>137</sup>

#### 2.3.3.4.2 Procedure

A premises is closed under Article 9*bis* of the Drugs Act from a preventive point of view. It is, therefore, an administrative police measure ordered by the Mayor and not an administrative sanction.

So as not to jeopardise a criminal investigation<sup>138</sup>, consultation must take place prior to the closure between the Mayor and the Public Prosecutor. In this perspective, Article 9*bis* of the Drugs Act offers a legal basis for the exchange of judicial information with the Mayor, although this exchange is only possible in a specific case where there are already indications of illegal activities taking place. The information exchange cannot therefore take place on a preventive basis.<sup>139</sup>

Prior to the decision to close, the Mayor must hear the defence of the person in charge of the premises in question. To prepare for the hearing he could draft a provisional closure decision, which need not necessarily be passed on the operator concerned. It is sufficient that the latter is able to put forward his arguments at the hearing and that the Mayor is able to take them into account when eventually making his decision.<sup>140</sup>

#### 2.3.3.4.3 Duration of the closure

The closure applies for the duration determined by the Mayor, on the understanding that this measure will cease to have effect if it is not ratified at the next meeting of the Board of Mayor and Aldermen and not brought before the next session of the municipal council.

In principle, the closure measure has a maximum duration of six months. Subject to approval by the municipal council, a single extension of the same period will, however, be possible if, after the initial decision, similar new circumstances arise, or if similar circumstances have since come to light. Whereas the latter certainly could arise in practice, the former is difficult to imagine. The establishment is after all by definition closed, so there it is questionable how similar new circumstances could arise.<sup>141</sup>

When premises are closed on the basis of Article 9*bis* of the Drugs Act, account must likewise be taken of the proportionality principle (*supra*, Section 2.2.3.3.3).<sup>142</sup> Hence, the closure must result from a weighing up, with a sense of proportion, of all the information and interests, and in which context special attention must be paid to the operator's efforts

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137 *Parl.St.* Kamer van Volksvertegenwoordigers 2005-2006, nr. 2518/001, p. 46.

138 *Parl.St.* Kamer van Volksvertegenwoordigers 2005-2006, nr. 2518/021, p. 27.

139 De Buysscher 2007, p. 54.

140 Raad van State, Van Den Borre, Moreels and B.V.B.A. Kings, nr. 188.765, 12 December 2008.

141 *Parl.St.* Kamer van Volksvertegenwoordigers 2005-2006, nr. 2518/001, p. 360.

142 *Parl.St.* Kamer van Volksvertegenwoordigers 2005-2006, nr. 2518/001, p. 360.

to tackle the drug problem identified.<sup>143</sup> The Mayor, who closes a discotheque for two months, while the operator has taken every step to tackle the drug problem and is also extremely cooperative, will have to give adequate reasons as to why a less radical measure would not have sufficed. The mere circumstance that the Mayor could order a much longer closure does not at all suffice in this perspective.<sup>144</sup> If however the operator of a discotheque that had been closed for four months does not apply an anti-drugs policy on reopening his business and does not comply with the agreements made with the administration, while drugs are again repeatedly trafficked and used in the discotheque, this may justify a new four-month closure.<sup>145</sup>

### 2.3.3.5 Indications of trafficking or smuggling in human beings

#### 2.3.3.5.1 Scope

Article 134*quinquies* of the New Municipality Act relates to the policing competence of the Mayor in the fight against trafficking and smuggling in human beings.<sup>146</sup> To tackle such phenomena administratively, the Mayor has been given the authority to close down establishments under certain conditions. A closure order can be issued if there are serious indications that incidents of human trafficking or migrant smuggling are taking place in the establishment concerned. Whereas Article 9*bis* of the Drugs Act, as analysed above, refers to private premises which are open to the public, Article 134*quinquies* of the New Municipality Act gives no further qualification of the establishments. It could be argued that on the basis of the latter provision the Mayor can also close down premises that are not open to the public. On this point, this competence would be broader than the aforementioned competence to temporarily close an establishment open to the public by virtue of Article 134*quater* of the New Municipality Act.

A decision to close can only be made if the human trafficking or migrant smuggling offences actually take place in the establishment concerned, meaning that the mere use of this establishment to enable or facilitate trafficking or smuggling in human beings is not sufficient. Given the gravity of the crimes, however, a one-time determination of the serious indications required is sufficient to close the establishment down.<sup>147</sup>

143 Raad van State, N.V. Fievez-Cadet, nr. 166.335, 29 December 2006; Raad van State, B.V.B.A. Beverly's, nr. 187.355, 24 October 2008; Raad van State, Cigna, nr. 192.904, 30 April 2009.

144 Raad van State, N.V. Fievez-Cadet, nr. 166.335, 29 December 2006. See also Raad van State, Cigna, nr. 192.904, 30 April 2009.

145 Raad van State, Van Den Borre, Moreels and B.V.B.A. Kings, nr. 188.765, 12 December 2008.

146 For a detailed analysis, see Van Daele 2013, p. 286-298.

147 *Parl.St.* Senaat 2010-2011, nr. 5-455/3, p. 6.

#### 2.3.3.5.2 Procedure

The competence to close the establishment down is exclusive to the Mayor<sup>148</sup>, who may act on his own authority and need not obtain the consent of the Board of Mayor and Aldermen, or of the municipal council. The Mayor will, however, have to notify the municipal council of the closure decision. If the obligation to give notification is not honoured, this does not, however, have as a consequence that the closure decision is ineffective.

This administrative competence invested in the Mayor does not affect the authority of the Public Prosecutor to initiate a criminal investigation and to prosecute the offenders.<sup>149</sup> The competencies of the examining magistrate in the framework of a judicial inquiry also apply without restriction. So as not to impede the criminal investigation in any way, the Mayor will consult the judicial authorities beforehand and, in doing so, inform the Public Prosecutor of his intention to close down an establishment and ask whether there are any objections to this.<sup>150</sup> If the Public Prosecutor – in consultation if needs be with the examining magistrate – is of the opinion that, in the light of an ongoing criminal investigation or judicial inquiry, objections exist, he will make this viewpoint and the reasons for it known to the Mayor. In this sense, Article 134*quinquies*, paragraph one of the New Municipality Act provides a legal basis for an exchange of judicial information with the Mayor, although the Public Prosecutor may not wish to enter into detail about the ongoing criminal investigation. Moreover, the provision of information is only allowable in a specific case in which there are already serious indications of human trafficking or migrant smuggling taking place in the establishment concerned. Therefore, also in this case, the information exchange may not have a preventive basis. For that matter, it should be stressed that the judicial authorities do not have the right of veto. The raising of objections from a criminal law perspective does not prevent the Mayor from closing the establishment down.<sup>151</sup>

Prior to the closure decision, the Mayor must hear the defence of the person in charge of the establishment concerned. Logically, this will take place following the consultations between the Mayor and the judicial authorities. It cannot be ruled out that, on the basis of this consultation, the Mayor may decide to abandon his former decision to close the establishment, meaning that there is no need to hear the person concerned. The obligation to grant a hearing applies not only to the owner of the establishment in question, but, when the occasion arises, to its tenant. We might consider, for example, the case in which an unsuspecting landlord rents a premises in good faith to a person whose actions in that

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148 *Parl.St.* Senaat 2010-2011, nr. 5-455/3, p. 7.

149 *Parl.St.* Senaat 2010-2011, nr. 5-455/1, p. 2

150 *Parl.St.* Kamer van Volksvertegenwoordigers 2010-2011, nr. 53-1468/002, p. 3-5 and 7. See also *Parl.St.* Senaat 2010-2011, nr. 5-455/3, p. 3-4.

151 *Parl.St.* Kamer van Volksvertegenwoordigers 2010-2011, nr. 53-1468/002, p. 5-6.

premises qualify as human trafficking. In practice, there may also be cases in which the landlord is not entirely unaware of the actions in question.<sup>152</sup>

Although not explicitly required by Article 134*quinquies* of the New Municipality Act, it is recommended that the Mayor make the decision to close an establishment in writing and sign it, then hand the decision to the person in question or send it by registered letter. As an administrative act in the sense of the Act of 29 July 1991, the closure decision must be materially and formally reasoned (*supra*, Section 2.2.3.3.4).

#### 2.3.3.5.3 Duration of closure

The closure of an establishment on the basis of Article 134*quinquies* of the New Municipality Act applies for the duration set by the Mayor, on the understanding that this term will be a maximum of six months. At the end of the term the Mayor's decision expires by law. The legislation does not provide for the option of extending the closure measure. A new closing order can only be issued at the end of the term if this measure is part of a new case<sup>153</sup>, in which there are new serious indications of human trafficking or migrant smuggling at the same establishment.

If compliance with the closure decision is not forthcoming, the Mayor can put the establishment under seal. This includes non-compliance with the closure decision on the part of the establishment's operator or another person.<sup>154</sup>

## 2.4 THE INFORMATION POSITION OF THE ADMINISTRATIVE AUTHORITIES

Effective and efficient use of the competence invested in the Board of Mayor and Aldermen either to suspend or revoke a licence, or to close down an establishment by means of an administrative sanction, is only possible if this body has adequate information at its disposal. The same applies for the Mayor seeking to use an order preservation measure to suspend a licence or close down premises or establishments. On the one hand, the Board and the Mayor can make use of the reports of the administrative police, as well as any information voluntarily provided at the hearing by the person concerned. On the other hand, this raises the question of to what extent municipal authorities have access to judicial information, data regarding criminal convictions or tax information.

On the basis of Article 44/1, § 4 of the Police Service Act, judicial information can be passed on to the administrative police authorities if there is a functional link between this

<sup>152</sup> *Parl.St.* Kamer van Volksvertegenwoordigers 2010-2011, nr. 53-1468/002, p. 3-4 and p. 6-7.

<sup>153</sup> *Parl.St.* Kamer van Volksvertegenwoordigers 2010-2011, nr. 53-1468/002, p. 8.

<sup>154</sup> *Parl.St.* Senaat 2010-2011, nr. 5-455/3, p. 6.

information and the maintenance of public order.<sup>155</sup> If, while performing their judicial police duties, information comes to the attention of the police services that is likely to be of value in administrative policing and could lead to administrative policing decisions, they will inform the competent administrative police authorities of this immediately. However, this obligation does not apply if provision of the information could prove damaging to criminal proceedings, although even then measures must be able to be taken that are necessary in the event of a serious and immediate danger to people, public safety or public health. If there is doubt as to whether or not a threat to criminal proceedings exists, the police service can only pass on the judicial information to the administrative authorities with the consent of the competent magistrate.<sup>156</sup>

In addition, any person who does not have a “direct interest” in the sense of Article 21*bis*, paragraph 2 of the Code of Criminal Procedure can ask the Public Prosecutor’s office to allow them to consult the criminal file or to provide a copy of the file.<sup>157</sup> The Mayor can also make such a request. The decision to allow access to or provide a copy of the records of a criminal case falls exclusively to the Public Prosecutor. It should be remembered here, however, that this legal regulation merely gives the right to make a request and so does not create a right to view or copy a criminal file.<sup>158</sup> The competent prosecutor will assess any request at his own discretion, taking into account the criteria set by the Board of Procurators General. Consent to view and/or copy the file will not be given, for example, if so necessitated in the interests of the criminal proceedings; if viewing would constitute a danger to certain persons or a serious violation of privacy; or if the requestor provides no justifiable reason to consult the file.

When screening applicants for licences and grants or participants for tenders, it is recommendable that the administrative authorities have access to the criminal record of the person in question. The information required is available from the Central Register of Criminal Records, which is maintained by the Minister of Justice.<sup>159</sup> With a view to applying administrative measures that call for knowledge of the criminal records of the persons to whom they relate, most of the information contained in this register can be made available to the administrative authorities determined by the King.<sup>160</sup> Although some tax officials and some officials from the Immigration Affairs Service have access to the Central Register of Criminal Records<sup>161</sup>, this has not been the case for municipal authorities

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155 De Buysscher 2007, p. 51; Van Heddeghem & Vander Beken 2002, p. 237; Van Heddeghem et al. 2002, p. 137-138.

156 Van Daele et al. 2010, p. 332.

157 Article 21*bis*, paragraph 2 Code of Criminal procedure.

158 *Parl.St.* Kamer van Volksvertegenwoordigers 2011-2012, nr. 2429/001, p. 15 and 18.

159 See the Article 589 and Article 590 Code of Criminal Procedure.

160 Article 589, paragraph 2, 2° and Article 594 Code of Criminal Procedure.

161 See Royal Decree of 19 July 2001.

to date. It goes without saying that this seriously hampers any administrative approach to organised crime at the municipal level.<sup>162</sup>

Under Belgian law as it stands, municipalities and other administrative authorities do not have access to tax information, which equally limits the options available to an administrative approach to organised crime. However, a form of cooperation is possible between the judicial authorities and the tax administration. Tax officials can, for example, on their own initiative, or by request, provide tax information to the Public Prosecutor or examining magistrate. It should be remembered, however, that tax officials can be summoned as witnesses in preliminary criminal investigations, but that they may not cooperate with a preliminary criminal investigation in any other way.<sup>163</sup>

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162 See Van Daele et al. 2010, p. 341-345.

163 For a detailed analysis, see Van Daele et al. 2010, p. 354-364.

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### 3 THE ADMINISTRATIVE APPROACH IN THE CZECH REPUBLIC

*P. Zeman*

#### 3.1 INTRODUCTION

##### 3.1.1 *Approach to serious and organized crime and measures outside the scope of criminal law in the Czech Republic*

###### 3.1.1.1 Context

We begin this country report by emphasizing that the ‘administrative approach’ as a systemic alternative approach to crime control outside the criminal justice system does not as yet exist in the Czech Republic. This is true across the board, from the legal tools (where legislation regulates measures designed to combat crime almost exclusively as instruments of penal law) to practice (where administrative tools are not used systematically to control crime) and policy (where the ‘administrative approach’ is not part of official conceptual or strategic documents in the area of crime control).<sup>1</sup>

Nevertheless, this does not imply there are no administrative tools available in the Czech legal system that can be used to combat crime, including organized crime, in the sense of creating obstacles to using the legal administrative infrastructure for criminal activities. This country report therefore follows the structure and definitions designated for this project and presents a summary of these measures or tools in the context of Czech administrative law.

The fact that the administrative approach is not systematically applied to crime control in the Czech Republic means that the legislation that can be used in this area is fragmented in nature. Unlike the Netherlands, there is no unified and integrated legislation for proving the personal integrity of applicants for different licences, subsidies or tenders (nothing like BIBOB, Wjsg or Wcp), or providing grounds for revoking them. The conditions are mainly set separately for different licences in special laws, with some basic general principles and procedures of administrative law applying. The procedures for granting or revoking licences, subsidies or tenders are administrative proceedings and if separate special laws

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<sup>1</sup> Although the current Strategy to Fight Organized Crime states that attention must go to the administrative approach in this area (see Section 3.1.1.2).

do not contain special provisions, the general procedural provisions of the Administrative Procedure Act apply (see below).

To make the following parts of this country report easier to understand, we briefly discuss administrative law in the Czech Republic and its relationship to penal law. Czech administrative law consists of a set of public law regulations that govern the organization and functioning of public administration. Unlike civil or penal law, administrative law is not codified (i.e. there is no single ‘Administrative Code’); it is enshrined in a large number of different sources of legal authority (including sources of European Community law).<sup>2</sup>

Administrative law also regulates the response to public law offences that are not criminal offences. The principle *nullum crimen sine lege* applies in the Czech Republic and it is expressed explicitly in Article 39 of the Charter of Fundamental Rights and Freedoms<sup>3</sup> and in Article 1 of the Penal Code<sup>4</sup>. Public law offences consist of two subsets, criminal offences and administrative offences. Administrative offences can be defined as acts violating or threatening the interests of society that the law labels ‘administrative offences’, unless they are criminal offences. This definition describes the relationship between criminal offences and administrative offences, which is based on the principle of penal repression as a means of *ultima ratio*: the penal code sets out an exhaustive list of criminal offences, while other public law offences are considered administrative offences.

Generally, an administrative offence is an unlawful act whose elements are defined in law, and for which an administrative sanction may be imposed by an administrative authority. The administrative offences are usually divided into misdemeanours, administrative offences by legal entities or natural persons conducting entrepreneurial activities, disciplinary administrative offences, procedural administrative offences, and ‘other’ administrative offences committed by natural persons or legal entities.<sup>5</sup> Administrative sanctioning, i.e. decisions by administrative authorities as to guilt and the sanctions imposed for an unlawful act of an administrative nature, is applied on a large scale in the Czech Republic. This can be illustrated by the fact that the Czech legal system contains more than 200 different laws that define what is meant by an administrative offence.<sup>6</sup>

At the end of this section, we point out that – besides administrative sanctions – administrative authorities can wield a number of other powers to enforce legal obligations, to prevent violations of such obligations, or to correct an unlawful situation (e.g. coercive measures, the power to prohibit certain activities etc.). The decision to impose an administrative sanction for an administrative offence and the decision to take one of the above-

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2 Hendrych 2012, p. 18.

3 Constitutional Act no. 2/1993 Coll., as amended.

4 Act no. 40/2009 Coll., as amended.

5 Hendrych 2012, p. 429.

6 Hendrych 2012, p. 417.

mentioned measures are different and self-sufficient legal instruments. This is why their concurrent use does not constitute a breach of the *ne bis in idem* principle.<sup>7</sup>

Public administration comes under the supervision of the administrative authorities, which can be divided into state administrators and local administrators (i.e. regional<sup>8</sup> and municipal authorities). But besides administrating their own matters ('separate competence'), local authorities also execute that part of the state administration delegated to them as a 'delegated competence'. State administration can be conferred on local authorities only by special laws and the local authorities (municipalities, regions) are given funds to cover the costs of exercising a delegated competence from the state budget.<sup>9</sup> Competence is very often delegated in the Czech legal system if state administration is to be exercised at the local level. For instance, the Trades Licensing Offices or the Building Offices at the municipal (regional) level are the municipal (regional) authorities that exercise a relevant part of state administration as a delegated competence.<sup>10</sup>

### 3.1.1.2 Historical background to the approach to organized crime in the Czech Republic

Large-scale and more developed forms of organized crime were unknown in the former Czechoslovakia<sup>11</sup> before 1989. Criminal activities typical of organized criminal groups were rare because of the massive presence of repressive bodies of the state and minimum demand for illegal goods and services as a consequence of the low purchasing power of citizens. It was too risky and unprofitable to engage in organized crime in such conditions.<sup>12</sup>

After the transformation of the political system in 1989 towards an open democratic society and after all the far-reaching changes in the economy, state administration, justice system, social structure and culture, the situation changed fundamentally. The country experienced the free movement of goods, investments and capital, and the conditions for travel changed. However, at the same time the movement of illegal goods, services and people increased as well. The possibility of abusing the open borders for criminal purposes has been boosted by the advantageous geographical location of the Czech Republic in the centre of Europe. Illegal migration has increased and different international criminal groups have established themselves in the country.<sup>13</sup> Other reasons for the sharp rise in

7 Hendrych 2012, p. 422.

8 The Czech Republic is geographically divided into 14 regions for administrative purposes.

9 Article 105 of the Constitution (constitutional Act no. 1/1993 Coll., as amended); Chapter III (Article 61 – 66c) of Act no. 128/2000 Coll., on municipalities, as amended; Article 29 – 30 of Act no. 129/2000 Coll., on regions, as amended.

10 Article 6 par. 3 of Act no. 570/1991 Coll., on trades licensing offices, as amended; Article 6, 7 of Act no. 183/2006 Coll., on spatial planning and building regulation, as amended.

11 Czechoslovakia split peacefully into two separate countries – the Czech Republic and the Slovak Republic – on 1 January 1993.

12 Cejp 2010, p. 13.

13 Cejp 2010, p. 13.

registered crime in the early 1990s were the headlong pace of the transition process, enormous shifts of property from state to private persons and the related growing socio-economic divide, the transformation of the legal system, the temporary weakening of the police and justice system, the weakened moral and legal consciousness of the inhabitants, and the fact that a large population of people born in the 1970s had reached the most productive age for criminal activity.<sup>14</sup>

Together with other influences from abroad, the types and forms of crime that had previously occurred only rarely in the country now emerged in the Czech Republic as well. This included drug trafficking, economic crime, trafficking in human beings, and other kinds of organized crime. Beyond the above-mentioned factors, the response to these problems has been complicated by the fact that the police and the judiciary did not have any experience of these types and forms of crime, and needed a specific approach and measures.

Originally, organized crime was perceived as a foreign element coming from abroad and was attributed to the invasion of foreign criminal groups. The danger of domestic forms of organized crime was rather underestimated and not given proper attention. Some criminal activities of Czech offenders with the characteristic features of organized crime (tax evasion, bank fraud, bankruptcy offences etc.) were therefore not presented as such in the first half of 1990s. Recognition of the risk of organized crime has gradually emerged, influenced by new findings by the law enforcement system and criminological research, and also under pressure by the international community. International efforts have led to the adoption of some important international agreements and their related obligations, which the Czech Republic had to satisfy as part of the process of accession to the EU, for example.<sup>15,16</sup> The process of adopting international standards in the approach to organized crime recently culminated in the ratification of the 2000 UN Convention against Transnational Organized Crime, which came into force in the Czech Republic on 24 October 2013.<sup>17</sup>

The first government 'Strategy to Fight Organized Crime' was adopted in 1996 and subsequently updated in 1997 and 2000. The second Strategy for 2008 – 2011 was adopted by the government in 2008.<sup>18</sup> At present the basic strategy document in this area is the Strategy to Fight Organized Crime for the years 2011 – 2014.<sup>19</sup> Tools and measures against organized crime have been introduced as part of this development but they almost exclusively relate to the criminal prosecution of organized criminal activity. Even those measures

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14 Cejp 1999.

15 Cejp 2009, p. 61.

16 The Czech Republic joined European Union on 1 May 2004.

17 Announcement by the Ministry of Foreign Affairs no. 75/2013 Coll.int.c.

18 Government resolution no. 64/2008 of January 23, 2008.

19 Government resolution no. 598/2011 of August 10, 2011.



that have an impact beyond the criminal justice system (e.g. the banking system) are mainly intended to provide the criminal justice system with information and other grounds for criminal proceedings.

For instance the Measures against Legalizing Proceeds of Crime and Financing Terrorism Act obliges enumerated financial institutions and other persons conducting entrepreneurial activities in specified cases to perform identity checks on clients, to monitor the circumstances of transactions and to report any 'suspicious trade' to the Financial Analytical Unit of the Ministry of Finance. If the Ministry finds facts indicating the criminal offence has been committed in the framework of suspicious trade, it notifies the police or the public prosecutor and provides them with all the relevant information for the purpose of criminal proceedings.<sup>20</sup>

The current Strategy makes reference for the first time to the necessity of using means and procedures other than only criminal ones in the battle against organized crime, but it does so for the future and without other specification:

In the future, it will be necessary to dedicate more attention to the administrative approach to the fight against organised crime. This approach should consist of cooperation (particularly the exchange of information) of all central administrative authorities and local government authorities, government department and state funded organisations with law enforcement authorities as a means of fighting organised crime through a concerted effort. This requires that employees of the above-mentioned bodies are duly informed and appropriately responsive to the (latent) manifestations of organised crime.<sup>21</sup>

### 3.2 EXISTING MEASURES ON SCREENING AND/OR MONITORING THE PAST AND PRESENT CRIMINAL ACTIVITIES OF NATURAL PERSONS

As mentioned in the previous section, there is no unified system for screening or monitoring whether natural persons or legal entities satisfy the requirements for a licence or a public subsidy or tender in the Czech Republic. The separate special laws regulating certain activities usually also define prerequisites for carrying out these activities – to obtain a licence, to draw a public subsidy or to participate in tenders. The following sections explain how the administrative authorities in the Czech Republic actually assess applicants for a licence, a subsidy or a tender, rather than describe the (non-existent) system.

<sup>20</sup> Articles 2, 7-15, 18, 32 of Act no. 253/2008 Coll., on some measures against legalising proceeds of crime and financing terrorism, as amended.

<sup>21</sup> Strategy to Fight Organized Crime for the years 2011-2014, p. 20.

This part of the country report focuses on screening and monitoring the characteristics of natural persons or legal entities for possible involvement in criminal activities. In this regard Czech law uses the term '**unimpeachable character**' (*bezühonnost*). Unimpeachable character can be defined roughly as quality, meaning that the person in question has not been punished in a specified way for specified offences during a specified period before an assessment. The laws identify unimpeachable character as one of the eligibility criteria for carrying out certain activities. They generally use the term in three different ways:

(a) Most frequently, the laws specify unimpeachable character as an eligibility criterion and then explicitly define who is considered to be of unimpeachable character for their purposes.

For instance according to the Road Act, the Ministry of Transport will issue a licence to audit the safety of roads to an applicant who is of unimpeachable character and has proven professional capacity. A person is not of unimpeachable character if he/she was convicted of an intentional criminal offence and received an unconditional sentence of imprisonment for at least one year.<sup>22</sup>

(b) The second group consists of laws that refer to another regulation in which there is an exact definition.

For example the Commercial Code identifies unimpeachable character within the meaning of the Trades Licensing Act as one of the eligibility criteria for carrying out the function of a member of the board of directors in a joint-stock company (i.e. the person is considered to be of unimpeachable character if he/she fulfils the conditions of unimpeachable character defined in the Trades Licensing Act).<sup>23</sup>

(c) The third group consists of laws that identify unimpeachable character as an eligibility criterion without defining the term. This is an undesirable approach because it does not meet the requirements of the principle of legal certainty for participants in administrative relationships. In this case unimpeachable character should be interpreted as the absence of any conviction (according to the grammatical and systematic interpretation), which is a very strict condition. Even the Czech Constitutional Court has criticized this concept of unimpeachable character in the past.<sup>24</sup> This is why the latest interpretation of the term in

22 Article 18h paragraph 1, 2, 4 of Act no. 13/1997 Coll., on roads, as amended.

23 Article 194 paragraph 7 of Act no. 513/1991 Coll., commercial code, as amended.

24 E.g. in 2009 the Constitutional Court found a discrepancy between the Charter of Fundamental Rights and Freedoms and the Trades Licensing Act, which maintains a very broad definition of unimpeachable character as one of the eligibility criteria for carrying out a trade (the absence of a conviction for any intentional criminal offence if the applicant received an unconditional sentence of imprisonment for at least one year,

such cases involves the criminal (but also moral) integrity of a person, primarily in relation to the activity for which his or her character is being assessed.<sup>25</sup> The laws in this group have however been gradually amended to provide more accurate definitions of unimpeachable character, so such cases are only rare at present.

For example one of the prerequisites for entry into the list of barristers (Bar members) according to the Bar Act is that the applicant is of unimpeachable character, but the term is not defined in the law in any way.<sup>26</sup>

Moreover some laws identify the absence of previous convictions for certain offences as an eligibility criterion for carrying out certain activities without using the term ‘unimpeachable character’. For instance according to the Bank Act, a person convicted in the past of a property offence or an offence related to banking or to business cannot act as a bank manager.<sup>27</sup>

The official outputs of the **Penal Register** (*Rejstřík trestů*, PR) serve as an instrument to establish a person’s unimpeachable character. The PR is a government institution under the Ministry of Justice that keeps records of natural persons and legal entities (‘persons’) convicted by the courts in criminal proceedings and of other important facts for criminal proceedings. The records can be used for criminal, civil or administrative proceedings as well as for proving a person’s unimpeachable character. The organization and functioning of the PR are governed by the Penal Register Act.<sup>28</sup>

There are two basic outputs of the PR: a **copy of the PR records** (*opis z evidence Rejstříku trestů*, CPR) and an **extract from the PR records** (*výpis z evidence Rejstříku trestů*, EPR).

The CPR is a public document<sup>29</sup> containing a comprehensive list of records kept on a given person or entity in the PR. It contains all the records on every conviction of the natural person or legal entity in question, on all records on the course of the execution of

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or if the offence was committed in relation to trading). The Constitutional Court stated that ‘*The reason and purpose of the requirement of unimpeachable character is the protection of the basic rights and freedoms of other people, which could be affected by a trade carried out in violation of the law and good manners. This requirement however needs to meet the criteria that the principle of proportionality brings to the evaluation of the regulation ensuring one basic right or freedom but limiting another*’. Constitutional Court judgment no. Pl. ÚS 35/08.

25 E.g. the decision of the District Court in Prague 1 no. 11 C 25/2000, of 13 March 2001.

26 Article 5 paragraph 1 item d) of Act no. 85/1996 Coll. on the Bar, as amended.

27 Article 4 paragraph 7 of Act no. 21/1992 Coll., on banks, as amended.

28 Act no. 269/1994 Coll. on the Penal Register.

29 In Czech law, the term ‘public document’ means a document issued by a public authority within its competence or identified as a ‘public document’ by special law (Article 567 of Act no. 89/2012 Coll., civil code).

punishments and protective measures,<sup>30</sup> and on expunged convictions (natural persons) or the ‘cessation of conviction effects’ (legal entity).<sup>31</sup> The CPR also contains other facts important for criminal proceedings (records on diversion – e.g. conditional suspension of prosecution, out-of-court settlement, conditional deferral of a petition for sentencing).<sup>32</sup>

The CPR can only be issued on application:

- a. to bodies acting in criminal proceedings and to the Ministry of Justice, for the purpose of those proceedings;
- b. to the Office of the President of the Czech Republic, for the purpose of proceedings on a petition for a pardon or the assessment of candidates for certain functions;
- c. to other authorities where stipulated by law or by binding international treaty.

Besides for criminal proceedings and to the Office of President of the Czech Republic, the CPR can therefore be issued only to other authorities specified in a special law (e.g. for purposes of information gathering by the intelligence services). To prove unimpeachable character, this can be for the purpose of obtaining a licence for an activity of a pronounced public nature (e.g. the unimpeachable character of an applicant for a firearms licence according to the Firearms Act,<sup>33</sup> or for the adoption of an child according to the Social and Legal Protection of Children Act<sup>34</sup>), or to apply for a certain function or occupation of a public nature (e.g. the unimpeachable character of an applicant for admission to the Czech Army according to the Career Soldiers Act<sup>35</sup>). In these cases, it is the authority assessing unimpeachable character that requests the CPR. The CPR cannot be issued to the person who is the subject of the CPR records – this person can only inspect the CPR on application (or he/she can request an EPR – see below).<sup>36</sup> As described above, the CPR serves exclusively

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30 By the “course of the execution of punishment and protective measures” is meant: the information on important facts that occurred during the execution of punishment or during the execution of a protective measure. E.g. the date of conditional release from imprisonment, the date of payment of a fine, the date of change of in-patient protective treatment to out-patient protective treatment etc.

31 Czech penal law recognizes certain cases where earlier convicted subject (either natural person or legal entity) is considered “as not being convicted”. These are cases where the effects of conviction is expunged and the fact of previous convictions cannot be taken into account anymore – e.g. for the purpose of assessing re-offending in the criminal proceedings. The cessation of conviction effects is generally connected either with the expiry of a specific time after the execution of punishment (“deletion of conviction” in case of natural person and “cessation of conviction effects” in case of legal entity) or with the successful execution of certain punishments (see footnote 38). So the term “cessation of conviction effects” means in the Czech law either (a) in general, the situation where earlier convicted subject is considered “as not being convicted” henceforth; or (b) the equivalent of the term “deletion (expungement) of conviction” in cases of legal entities (because the term “deletion of conviction” can be used only in respect of natural persons).

32 Article 10 paragraph 5 of Act no. 269/1994 Coll., on the Penal Register, as amended.

33 Article 22 paragraph 4 of Act no. 119/2002 Coll., on firearms and ammunition, as amended.

34 Article 27 paragraph 3 of Act no. 359/1999 Coll., on the social and legal protection of children, as amended.

35 Article 4 paragraph 3 of Act no. 221/1999 Coll., on career soldiers, as amended

36 Article 10 paragraph 4 of Act no. 269/1994 Coll., on the Penal Register, as amended.

in the case of criminal proceedings or certain administrative procedures of a pronounced public nature. This is why it can be issued only to the authorities specified in a special law.

The content of the EPR is more limited. This public document contains all convictions, including records on sentences and protective measures if the offender is not considered as having been convicted.<sup>37</sup> The difference between the CPR and the EPR is that the former contains all the records included in the EPR *and* records on expunged convictions whose effects have ceased (as well as records on other facts important for criminal proceedings as stated by law and not included in the EPR, e.g. information on diversion – see above). The EPR can be issued at the request of the natural person to whom the records relate. The EPR on a legal person can be issued to any applicant.<sup>38</sup> It can also be issued at the request of a court or public prosecutor for other than criminal proceedings and on the application of an administrative authority for administrative procedures. For any other purpose, the EPR can be issued only if permitted by special law.<sup>39</sup>

Only the PR may issue the CPR and the person entitled to inspect the CPR may only peruse it at the PR's main office. The EPR may either be issued by the PR (in physical form or in electronic form following submission of an electronic application with an electronic signature) or obtained at the public administration contact point (i.e. Czech POINT).<sup>40</sup> The tasks of Czech POINT are carried out, for example, by public notaries, regional or municipal authorities, post offices and some banks.<sup>41</sup> The Czech POINT network currently consists of more than 7000 branches.

An administrative fee is paid to inspect the CPR or obtain an EPR.<sup>42</sup> The fee is currently CZK 20 (approx. EUR 0.75) to inspect the CPR and CZK 100 (approx. EUR 3.70) to obtain an EPR. Public authorities do not have to pay the fee.

Besides the concept of unimpeachable character, some laws also use the term '**reliability**' (*spolehlivost*) as an eligibility criterion. Even this term is not used uniformly in the various laws, however. This requirement relates not only to the criminal history of an applicant, but also concerns eventual unlawful behaviour as an administrative offence, unlawful behaviour generally, or behaviour that is not unlawful but is undesirable in the relevant context. Some laws use reliability as a parallel feature to unimpeachable character; others use it as a broader, superior term that includes the concept of unimpeachable character.

37 The conditions for the cessation of conviction effects are set by criminal law. Such effects may cease if a conviction is expunged from the criminal record (after a specified time has elapsed), a sentence of community service or a prohibition on engaging in a certain activity has been executed, or a sentence has been suspended owing to the offender's having served his or her punishment during a probationary period.

38 Article 11 paragraph 1 of Act no. 269/1994 Coll., on the Penal Register, as amended.

39 Article 12 of Act no. 269/1994 Coll., on the Penal Register, as amended.

40 Article 11a paragraph 1 of Act no. 269/1994 Coll., on the Penal Register, as amended.

41 Article 8a paragraph 2 of Act no. 365/2000 Sb., on information systems of public administration, as amended.

42 Article 14 paragraph 1 of Act no. 269/1994 Coll., on the Penal Register, as amended.

For instance the eligibility criteria for issuing a firearms licence according to the Firearms Act include both unimpeachable character and the reliability of the applicant. The applicant is not considered to be reliable if he/she is likely to drink alcohol to excess or use other addictive substances, or presents a serious threat to public order and safety.<sup>43</sup> In this case the information on the potential excessive use of addictive substances is obtained from the local police authority and not from medical facilities such as addiction centres. The 'excessive use' of addictive substances does not require a person to be an addict; it means use beyond the limits of common consumption, leading to social, mental, labour etc. problems and raising doubts about the ability of an individual to obey the law and to use a firearm without threatening values protected by the law (life, health, property etc.). It is the task of the authority deciding on the application (a specified police detail) to consider all the information gathered and to assess the reliability of an applicant.

According to the Fuels Act, an applicant for a licence to distribute fuels can obtain the necessary approval of the Customs office only if he/she fulfils the requirement of reliability. A person is considered to be reliable if he/she has an unimpeachable character and has not violated tax or customs regulations in any serious manner in the past three years.<sup>44</sup>

The special laws that take a person's reliability as an eligibility criterion provide their own definition of reliability, set out how reliability is to be proven, and specify the body that is to assess reliability (as a rule it is the authority that grants or revokes the relevant licence).

### 3.2.1 *Licences*

Certain activities and professions that are, for different reasons, subject to the supervision of the public authorities are regulated by separate special laws in the Czech Republic. This is based on the Czech Constitution, which stipulates that the authority of the state serves all citizens and can be exercised only in cases and manners and subject to the limits set by law.<sup>45</sup> The relevant laws thus state whether the approval of a public authority – i.e. a licence – is necessary to carry out certain activities or professions. They define which authority is competent to decide on a licence and set the eligibility criteria. They also set the requirements of a satisfactory criminal history (unimpeachable character) or reliability. In other words, there is no single general law regulating the assessment of applicants for licences; assessment is regulated separately for each licence in different laws, although the conditions and requirements are in some cases very similar.

43 Article 18 paragraph 1, Article 23 paragraph 1 of Act no. 119/2002 Coll., on firearms and ammunition, as amended.

44 Article 6a paragraph 2, Article 6b paragraph 1 of Act no. 311/2006 Coll., on fuels and petrol stations, as amended.

45 Article 2 paragraph 3 of the Constitution (constitutional Act no. 1/1993 Coll., as amended).

The basic legislative act for business is the Trades Licensing Act<sup>46</sup> (*živnostenský zákon*, TLA), which regulates the conditions of trade and monitoring of compliance. Although the TLA does not apply to a number of professions and business activities, which are regulated by special laws (e.g. physicians, barristers, auditors, public notaries, tax consultants etc.), it can be labelled as a general trade regulation. The TLA divides trades into ‘notification trades’, which can be carried out on the basis of simple notification, and ‘concession trades’, which require a special kind of licence (i.e. concession).<sup>47</sup> In the latter case, trade can only be conducted by the holder of a trade licence (*živnostenské oprávnění*, TL).<sup>48</sup>

State administration in the area of trade is exercised by Trades Licensing Offices (*živnostenské úřady*, TLO).<sup>49</sup> The TLOs act at the municipal level (trades licensing divisions of municipal offices), at the regional level (trades licensing divisions of regional offices); at the central level, there is a Czech Trades Licensing Office. Municipal and regional TLOs exemplify the devolution of competence in state administration.

The TLA has specified two main sets of requirements for granting TLs, general and special. The special requirement is professional competence to carry out the trade in question, which is assessed according to criteria fixed by law (e.g. a certain level of education, sufficient practice in a given branch of business, a special certificate of professional competence, etc.). The general requirements to carry out a trade are: (a) the age of 18 or more, (b) competence to carry out legal acts, (c) an unimpeachable character. A person is not considered to have an unimpeachable character if he/she has been convicted of an intentional criminal offence committed in relation to the business activities or the subject of the trade for which he/she has applied, unless he/she is considered to have not been convicted of this offence. The EPR must produce evidence of the applicant’s unimpeachable character. The TLO is authorized to ask the PR for an EPR in electronic form in order to assess the applicant’s unimpeachable character. It is also authorized to ask a court for a copy of its decision. If the decision does not contain facts decisive for the assessment, the TLO is authorized to look into the criminal court file concerning these facts.<sup>50</sup>

It should be noted that the administrative approach to the process of proving different facts about citizens, if such information is available in an official register, has been changing in the Czech Republic. Until recently, as a rule, the applicant had to submit records taken from the relevant official register (e.g. the PR) along with his/her application proving that he/she met the eligibility criteria. As part of the process of taking public administration online in the Czech Republic (e-government), this task is being transferred from the applicant to the authority deciding on the application. This is the case for the EPR with

46 Act no. 455/1991 Coll., on trading.

47 Article 9 of Act no. 455/1991 Coll., on trading, as amended.

48 Article 10 paragraph 1 of Act no. 455/1991 Coll., on trading, as amended.

49 Their organization and competences are regulated by Act no. 570/1991 Coll., on trades licensing offices.

50 Article 6 of Act no. 455/1991 Coll., on trading, as amended.

respect to assessing unimpeachable character – today it is the authority deciding on the application who asks the PR for an EPR, and it does so on the basis of authorization granted in the law regulating the relevant area. In other words, if a certain law currently requires an applicant to have an unimpeachable character before he/she can be granted a licence, it also entitles the authority that grants the licence to ask the Penal Register for the applicant's EPR, so that the applicant does not need to present the EPR him/herself (the same applies to all cases where a public authority requires information from the PR on a person for a decision taken in administrative proceedings – not only to licence procedures). As for TL applications, this change occurred with effect from 1 July 2008, on the basis of Act no. 130/2008 Coll. amending the TLA. Since then, all official documents (applications, requests, statements etc.) can be delivered to the TLOs through Czech POINT.<sup>51</sup>

### 3.2.2 Subsidies

There is no unified legislation on the assessment of applicants for a subsidy in the Czech Republic. The coordinating authorities are the Ministry of Agriculture (for agriculture, forestry and fishery) and the Office for the Protection of Competition (*Úřad pro ochranu hospodářské soutěže*, OPC). Special laws have established several funds at the national level that provide money for public aid in specific areas (e.g. the State Agricultural Intervention Fund,<sup>52</sup> the State Fund for Transport Infrastructure,<sup>53</sup> the State Environmental Fund of the Czech Republic,<sup>54</sup> etc.).

The Public Aid Act<sup>55</sup> and the Transparency Act<sup>56</sup> have a more general impact on public aid, but do not cover the assessment of applicants; instead, they regulate certain issues of competence and organization under EU legislation.<sup>57</sup> Public aid is thus defined as aid specified in Article 107 of the Treaty on the Functioning of the European Union,<sup>58</sup> i.e. any aid granted by a state or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.<sup>59</sup>

If public aid is granted directly through the state budget, the provisions of the Budgetary Rules Act, which regulates the funding of programmes and the provision of grants and

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51 Article 72 paragraph 1 of Act no. 455/1991 Coll., on trading, as amended.

52 Act no. 256/2000 Coll., on the State Agricultural Intervention Fund.

53 Act no. 104/2000 Coll., on the State Fund for Transport Infrastructure.

54 Act no. 388/1991 Coll., on the State Environmental Fund of the Czech Republic.

55 Act no. 215/2004 Coll., on regulation of certain relations in the area of public aid.

56 Act no. 319/2006 Coll., on certain measures to make financial relations in the area of public aid more transparent.

57 Janků & Mikušová 2012, p. 21-29.

58 Article 2 item a) of Act no. 215/2004 Coll., on regulation of certain public aid relations, as amended.

59 Article 107 paragraph 1 of the Treaty on the Functioning of the European Union.



financial assistance through the state budget, apply.<sup>60</sup> Regional and local authorities are authorized to regulate the granting of subsidies from their own budgets.

The conditions of individual public aid programmes, including the assessment of applicants for a subsidy, are defined separately in special regulations. Czech regulations must also respect EU legislation in this field.<sup>61</sup>

An applicant's possible criminal background is not screened directly – the eligibility criteria relate mainly to the purpose for which the subsidy will be granted or to transparency in drawing the subsidy. The emphasis is on compliance with the binding EU legislation. The applicant in the subsidy procedure therefore usually presents information on his/her legal identity (an extract from the Commercial Register, a deed of establishment, statutes, by-laws etc.), on his/her financial, tax or administrative situation, as well as other information specified separately for the given subsidy. This applies for public aid granted by the state as well as through other public sources such as regional or municipal budgets. Monitoring after public aid has been granted usually focuses on compliance with the conditions under which the aid was granted.

However, it should be noted that the relevant laws stipulate that an applicant must have an unimpeachable character in order to carry out a trade, to act as a statutory body or authorized representative of a company, or to carry out certain specific activities (see above). By defining the eligible applicant and the eligible contractor (e.g. persons carrying out a trade, persons authorized for a certain activity etc.), the regulations relating to subsidies usually – although indirectly – take the criminal context into account (they exclude persons who do not meet the requirement of unimpeachable character).

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60 Article 12-19 of Act no. 218/2000 Coll., on budgetary rules, as amended.

61 In particular Article 107 of the Treaty on the Functioning of the European Union; Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty; Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty; Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty; Commission Regulation (EC) No 1147/2008 of 31 October 2008 amending Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, as regards Part III.10 of its Annex 1; Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid; Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid; Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation).

### 3.2.3 Tenders

The basic law governing public procurement in the Czech Republic is the Public Procurement Act (*zákon o veřejných zakázkách*, PPA).<sup>62</sup> The PPA incorporates the relevant EU legislation<sup>63</sup> and regulates public procurement procedures, design competitions, supervision of compliance with the Act, and the conditions for keeping and the purpose of the list of qualified suppliers and the system of certified suppliers.<sup>64</sup>

The conditions and the procedure for concluding concession contracts as part of the cooperation between public contracting authorities and other persons are governed by the Concession Act (*koncesní zákon*, CA).<sup>65</sup> The concession contract obliges the concessionaire to provide the public contracting authority with services or to carry out work for the public contracting authority, and it obliges the public contracting authority to enable the concessionaire to benefit from providing services or to benefit from the work, where relevant along with a partial pecuniary payment.<sup>66</sup>

Public procurement according to the Public Procurement Act is an act of procurement carried out under a contract concluded between the contracting entity and one or more suppliers, the subject of which is the provision of supplies or services or construction work for a pecuniary interest.<sup>67</sup> The contracting entity in a public contract can be entities that manage the public resources listed in Article 2 of the PPA (mainly the state and state allowance organizations, local government units and their allowance organizations, the

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62 Act no. 137/2006 Coll., on public procurement.

63 In particular Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 2005/75/EC of the European Parliament and of the Council of 16 November 2005 correcting Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC; Commission Directive 2005/51/EC of 7 September 2005 amending Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC of the European Parliament and the Council on public procurement.

64 Article 1 of Act no. 137/2006 Coll., on public procurement, as amended.

65 Act no. 139/2006 Coll., on concession contracts and concession procedure.

66 Article 16 paragraph 1 of Act no. 139/2006 Coll., on concession contracts and concession procedure, as amended.

67 Article 7 paragraph 1 of Act no. 137/2006 Coll., on public procurement, as amended.

person awarding public contracts of which more than 50% is funded from public resources, etc.). Depending on their subject, public contracts are divided into public supply contracts, public service contracts, and public works contracts. Based on their estimated value they are divided into above-the-threshold public contracts, below-the-threshold public contracts, and minor public contracts.<sup>68</sup>

Chapter Five of the PPA is devoted to the qualification requirements that suppliers under public contract must meet. The qualification requirements should not be confused with the contract award criteria. The PPA explicitly states that a supplier's qualifications must not be the subject of contract award criteria.<sup>69</sup> Suppliers qualify<sup>70</sup> for a public contract if they:

- a. comply with the basic qualifications;
- b. comply with the professional qualifications;
- c. submit an affidavit of their economic and financial capacity to carry out the public contract; and
- d. comply with the technical qualifications.<sup>71</sup>

The contracting authority sets out the conditions for proving compliance with the qualification requirements in the notice or invitation to commence an award procedure (a tender). A detailed description of these conditions can be given in the qualification documentation or in the tender documentation. For this country report, it is important to focus on some of the basic qualifications, a list of which is included in Article 53 of the PPA. The suppliers comply with the basic qualifications if they (among other requirements):

(a) have not been convicted of the following: offences committed for the benefit of or participation in a criminal conspiracy, legalising the proceeds of criminal activities, being an accessory, accepting bribes, bribery, indirect bribery, fraud, loan fraud, including preparing for, attempting to or participating in these offences, or if their conviction for these offences has been expunged; in the case of legal persons, the legal person, the statutory body and each member of the statutory body must meet these qualifications; if a legal person acts as the statutory body or a member of the statutory body of a supplier, the statutory body and each member of the statutory body of the legal person must meet these qualifications; if a tender or request to participate is submitted by a foreign legal person via its branch, the above persons as well as the head of the branch must meet these qualifi-

68 Article 7 paragraphs 2, 3 of Act no. 137/2006 Coll., on public procurement, as amended.

69 Article 50 paragraph 5 of Act no. 137/2006 Coll., on public procurement, as amended.

70 The PPA has amended the qualification requirements for certain special categories of contracting entity (a sector contracting entity) or for public contracts (a below-the-threshold public contract). These amendments are not significant for this country report, however.

71 Article 50 paragraph 1 of Act no. 137/2006 Coll., on public procurement, as amended.

cations; the supplier both in the Czech Republic and in the country of its registered office, place of business or residence must meet these basic qualifications;

(b) have not been convicted of offences the facts of which, under special legal regulations, concern the business area of the supplier, or if their conviction for these offences has been expunged; in the case of legal persons, the legal person, the statutory body and each member of the statutory body must meet these qualifications, and if a legal person acts as the statutory body or a member of the statutory body of a supplier, the statutory body and each member of the statutory body of the legal person must meet these qualifications; if a tender or request to participate is submitted by a foreign legal person via its branch, the above persons as well as the head of the branch must meet these qualifications; the supplier both in the Czech Republic and in the country of its registered office, place of business or residence must meet these basic qualifications.<sup>72</sup>

For a public defence or security contract, the suppliers must meet the above basic qualifications but also not have been convicted of committing a terrorist attack, or of theft, blackmail, or counterfeiting and altering public documents in order to allow or facilitate the terrorist attack, including preparing for, attempting to or participating in such an offence, or their conviction for these offences must have been expunged; in the case of legal persons, the legal person, the statutory body and each member of the statutory body must meet these qualifications, and if a legal person acts as the statutory body or a member of the statutory body of a supplier, the statutory body and each member of the statutory body of the legal person must meet these qualifications; if a tender or request to participate is submitted by a foreign legal person via its branch, the above persons as well as the head of the branch must meet these qualifications; the supplier both in the Czech Republic and in the country of its registered office, place of business or residence must meet these basic qualifications.<sup>73</sup>

The suppliers prove compliance with the above basic qualification requirements by submitting an EPR.<sup>74</sup> The other basic qualification requirements relate to the suppliers' duties regarding economic competition, taxes, public health insurance and social security insurance, labour market etc. and to their not being listed in the Register of entities prohibited from carrying out public contracts (REPPC).<sup>75</sup> The REPPC is a public register containing records of persons that have received an administrative sanction prohibiting them from carrying out public contracts. This sanction can be imposed for the administrative offence of submitting, as proof of compliance with the qualifications, false information

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72 Article 53 paragraph 1 items a), b) of Act no. 137/2006 Coll., on public procurement, as amended.

73 Article 53 paragraph 2 item b) of the Act no. 137/2006 Coll., on public procurement, as amended.

74 Article 53 paragraph 3 item a) of the Act no. 137/2006 Coll., on public procurement, as amended.

75 Article 53 paragraph 1 items c) – k) of the Act no. 137/2006 Coll., on public procurement, as amended.

or documents which have affected or could affect the assessment of the supplier's qualifications.<sup>76</sup>

These PPA provisions also apply for the assessment of suppliers and their exclusion from the procedure for concluding concession contracts.<sup>77</sup>

### 3.2.4 *Screening and/or monitoring procedure and permitted information sources*

As this section will look at information sources that can be used in screening applicants for a licence, subsidy or tender, we begin by briefly describing the issue of personal data protection in the Czech Republic.

Given the history of the state abusing personal data during the communist period, the issue of personal data protection is a very sensitive one in the Czech Republic. As a result, the first regulation concerning personal data protection was adopted in 1992,<sup>78</sup> replaced in 2000 by the Personal Data Protection Act (*zákon o ochraně osobních údajů*, PDPA).<sup>79</sup> The PDPA strictly regulates the conditions for collecting and processing personal data, with an especially strict regime for 'sensitive' data, e.g. data on convictions for a criminal offence.<sup>80</sup> Generally, personal data may only be processed with the consent of the data subject. The PDPA provides for exceptions where processing is permitted even without such consent. One of the exceptions – which also applies for sensitive data – is data processing in the prevention, detection, investigation and prosecution of criminal offences, and in the search for people.<sup>81</sup> There is no similar general exception when it comes to assessing the integrity of applicants for licences, subsidies and tenders. When assessing the integrity of an applicant, the relevant authority can therefore only ask for data for which it has been authorized by a special law. This is the case for the Trades Licensing Offices, which assess the unimpeachable character of an applicant for trade licensing purposes based on an extract from the Penal Register records – they are entitled to ask the PR for an EPR only because the Trades Licensing Act explicitly authorizes them to do so (see also Section 3.2.1). The police and other law enforcement agencies can also provide other authorities or institutions with information about criminal proceedings only on the basis of a special legal mandate.<sup>82</sup>

76 Article 144 paragraph 1, Article 120a paragraph 1 item a) of the Act no. 137/2006 Coll., on public procurement, as amended.

77 Article 7 paragraph 3 of the Act no. 139/2006 Coll., on concession contracts and concession procedure, as amended.

78 Act no. 256/1992 Coll., on the protection of personal data in information systems.

79 Act no. 101/2000 Coll., on personal data protection.

80 Article 4 item. b) of Act no. 101/2000 Coll., on personal data protection, as amended.

81 Article 9 item i) of Act no. 101/2000 Coll., on personal data protection, as amended.

82 Article 8a, 8b of Act no. 141/1961 Coll., on criminal procedure, as amended.

### 3.2.4.1 Licences

As mentioned above, there is no unified regulation for screening applicants for different licences for their involvement in serious or organized crime. The qualification requirements, the assessment as to whether they have been met, and the competence of the relevant authorities in the assessment process are all governed by separate laws regulating the licensed activity in question. These special laws also state what information sources should be used by the competent authorities. The procedure for granting a trade licence is a good example.

The Trades Licensing Act regulates this procedure separately for notification trades and concession trades. The relevant person notifies the Trades Licensing Office of his intention to carry out a notification trade. As mentioned above, the TLO is authorized to ask the Penal Register for an electronic EPR on the applicant in order to assess his unimpeachable character (as a general requirement for granting a TL). It is also authorized to ask a court for a copy of its decision, where relevant. If the decision does not contain facts decisive for the assessment, the TLO is authorized to inspect the criminal court file dealing with these facts.<sup>83</sup> The TLA also governs how foreigners and legal persons with registered offices outside the Czech Republic can prove unimpeachable character.<sup>84</sup>

If the applicant meets all the conditions, the TLO enters him into the Register of Trade Licences within five working days of notification.<sup>85</sup> If the notification does not meet all the requirements, the TLO invites the applicant to remedy the shortcomings and sets a time limit (of at least 15 days) for this. The time limit can be extended repeatedly if the applicant indicates that there are serious reasons for doing so. If the applicant remedies the shortcomings before expiry of the prescribed time limit, the notification is considered perfect. If he/she does not, the TLO institutes proceedings and decides that the trade licence will not be issued. The same applies if the applicant does not meet the conditions prescribed by the TLA (including the unimpeachable character requirement).<sup>86</sup>

A person who wishes to carry out a concession trade applies to the TLO.<sup>87</sup> The procedure for proving unimpeachable character is similar to the procedure for the notification trades. However if the TLA or special laws require a special permit, authorization, or the opinion of any other administrative authority to carry out a specific concession trade, the TLO submits an application for a concession with the necessary documents to this authority, which is obliged to give an opinion within 30 days. Its opinion is binding on the TLO.<sup>88</sup> If

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83 Article 6 of Act no. 455/1991 Coll., on trading, as amended.

84 Article 46 of Act no. 455/1991 Coll., on trading, as amended.

85 Article 47 paragraph 1 of Act no. 455/1991 Coll., on trading, as amended.

86 Article 77 paragraphs 4, 5, 6 of Act no. 455/1991 Coll., on trading, as amended.

87 Article 50 paragraph 1 of Act no. 455/1991 Coll., on trading, as amended.

88 Article 52 paragraph 1 of Act no. 455/1991 Coll., on trading, as amended.

all the requirements are met, the TLO grants the concession and enters the applicant into the Register of Trade Licenses within five working days of the decision.

The TLA also regulates the grounds for the TLO revoking a trade licence.<sup>89</sup> Among the reasons for revoking a trade licence, the following are relevant for this country report:

- a. an entrepreneur has ceased to meet the requirement of unimpeachable character;
- b. an entrepreneur is in serious breach of the conditions set by the decision granting the concession or by the legal regulations – the TLO can decide on revocation on its own initiative or on the motion of the administrative authority that previously issued a binding opinion in the concession application procedure;
- c. an entrepreneur is not fulfilling his/her obligations towards the state – the TLO decides on a motion of the social security authority;
- d. there are ‘obstacles to carry out trades’.

These obstacles are listed in Article 8 of the TLA and include a court sentence or administrative sanction that prohibits the person (an applicant, an entrepreneur) from engaging in an activity related to a trade in the given or in a similar branch of business. The person is not allowed to carry out these trades for the duration of the prohibition. The EPR proves the non-existence of such an obstacle. The TLO is authorized to ask the PR for an electronic EPR about the person in question.<sup>90</sup>

As for the information sources that can be used to assess the unimpeachable character of an applicant, the basic source is the EPR, which the TLOs are authorized to obtain from the PR themselves. Another source is information provided by the applicant him/herself or requested from the applicant by the TLO. However the TLO can only request the information prescribed by the law. This also applies for the information from other public administration authorities. This information can be opinions on an application, findings of the relevant authorities’ monitoring activities, etc. The TLA states in this respect that the authorities monitoring according to special laws should cooperate with one another and if they detect a serious violation of the regulations by the entrepreneur, they should send a written decision on this matter to the appropriate TLO within 30 days. They should simultaneously report to the TLO on ascertained cases of unauthorized trading. The TLO, on the other hand, should notify the relevant authorities within 30 days (especially authorities supervising compliance with sanitary, safety and fire regulations) of violations of the relevant regulations by persons carrying out trades.<sup>91</sup>

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<sup>89</sup> Article 58 of Act no. 455/1991 Coll., on trading, as amended.

<sup>90</sup> Article 8 paragraph 5 of Act no. 455/1991 Coll., on trading, as amended.

<sup>91</sup> Article 68 of Act no. 455/1991 Coll., on trading, as amended.

For example, the Czech Trade Inspection Authority (Česká obchodní inspekce, CTIA) is the administrative government authority that monitors and inspects businesses and individuals who supply goods to or sell goods on the Czech market, provide services or similar activities on the domestic market, provide consumer credit, and operate marketplaces, unless, as a result of special legislation, these activities fall under the authority of another administrative institution. If the CTIA finds facts demanding special measures that fall within the competence of another authority, it notifies this authority of these findings.<sup>92</sup>

The TLO can of course use information from open sources on its own initiative. However, we must realize that this information could be important for the TLO's decision only if it proves that the applicant fulfils some of the prescribed conditions for carrying out a trade – and there are other ways of doing this, as described in the TLA. This means, for instance, that if there are media reports on the possible involvement of an applicant in criminal activities, the TLO is not authorized to refuse to grant him a trade licence (given that the applicant still meets the condition of unimpeachable character in terms of the TLA).

#### **3.2.4.2 Subsidies**

Section 3.2.2 explained that the subsidy procedure does not assess the applicant's potential criminal background directly even though it takes that background into account indirectly because an eligible applicant must usually hold a licence that requires an unimpeachable character (e.g. a trade licence). As a result, for subsidies we refer to the previous section on granting licences.

#### **3.2.4.3 Tenders**

In public procurement procedures, a contracting authority is obliged to require proof that the suppliers comply with the qualification requirements, with a few exceptions identified in the PPA.<sup>93</sup> If a public contract is to be carried out jointly by several suppliers that submit or intend to submit a joint tender, each supplier has to prove full compliance with the basic qualification requirements.<sup>94</sup> As mentioned above, the suppliers prove such compliance by submitting an EPR.<sup>95</sup> In this case it is not a contracting authority who asks the PR for an EPR, but the supplier that is obliged to submit it. If the supplier no longer meets the qualifications before the tender decision is issued, it must notify the contracting authority of this in writing not later than within seven working days.<sup>96</sup>

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92 Article 2 paragraph 1, Article 13 paragraph 4 of Act no. 64/1986 Coll., on the Czech Trade Inspection Authority, as amended.

93 Article 51 paragraph 1 of Act no. 137/2006 Coll., on public procurement, as amended.

94 Article 51 paragraph 5 of Act no. 137/2006 Coll., on public procurement, as amended.

95 Article 53 paragraph 3 sub a of Act no. 137/2006 Coll., on public procurement, as amended.

96 Article 58 paragraph 1 of Act no. 137/2006 Coll., on public procurement, as amended.



A public contracting authority assesses a supplier's compliance with the qualification requirements in view of the PPA requirements. It may appoint a special committee to assess qualifications. The public contracting authority may require the supplier to explain in writing any information or documents it has submitted, or to submit other information or documents proving compliance with the qualification requirements. The supplier is obliged to comply with this obligation within a reasonable time, as set by the contracting authority. The public contracting authority reports on its assessment of qualifications, identifying those suppliers whose qualifications have been assessed, furnishing a list of the documents used by the tenderers to prove their technical qualifications, and providing information about whether the tenderer had proved or failed to prove compliance with the qualifications. After the qualification assessment, the public contracting authority must immediately allow all suppliers whose qualifications have been assessed to inspect the qualifications assessment report and produce an extract or copy of it.<sup>97</sup> The contracting authority excludes suppliers that have failed to comply with the qualifications as required from the award procedure. The contracting authority must notify these suppliers without delay and in writing about its decision to exclude them from the award procedure, giving the reasons.<sup>98</sup>

A contracting authority assesses tenderers only against the criteria prescribed by law or specified in its own notice or invitation to commence an award procedure. The basic qualification requirements, i.e. those proving unimpeachable character, are defined in Article 53 para. 1 items a), b), 53 para. 2 item b) of the PPA, and they are shown by the EPR. As mentioned above, unlike the CPR, the EPR offers only a limited summary of a person's criminal history (it does not contain records of convictions for which a person is considered not to have been convicted – see above). A contracting authority is therefore advised to ask the supplier to confirm that there are no convictions beyond those displayed in the EPR, at least through an affidavit.

The supplier can prove compliance with the other basic qualification requirements by submitting either a certificate issued by the relevant authority (e.g. the Tax Office's certificate showing no tax debt) or its own affidavit (e.g. declaring that the supplier has not engaged in unfair competition by means of bribery in the past three years). The supplier is obliged to submit both kinds of documents, i.e. the contracting authority is not allowed to ask the other relevant authority for a certificate itself. Even the basic requirement that the supplier is not listed in the REPPC (see Section 3.2.3) must be proven by the supplier's own affidavit. Because the REPPC is an open public register, available without restriction on the internet, the contracting authority can verify compliance with this requirement at any time.

97 Article 59 paragraphs 1, 2, 4, 5, 8 of Act no. 137/2006 Coll., on public procurement, as amended.

98 Article 60 of Act no. 137/2006 Coll., on public procurement, as amended.

Where required by the PPA and the contracting authority, foreign suppliers must prove their compliance with the qualification requirements according to the laws of the country of their registered office, place of business or place of residence. If a particular document is not available pursuant to those laws, the foreign supplier must prove compliance with the relevant qualifications by affidavit. Documents proving foreign suppliers' compliance with the qualification requirements must be submitted in their original language, complete with a certified translation into Czech, unless the contracting entity's tender requirements or an international treaty binding on the Czech Republic state otherwise. The obligation to attach a certified translation in Czech does not apply for documents in Slovak.<sup>99</sup>

### 3.2.5 *Legal protection for a screened and/or monitored person*

#### 3.2.5.1 **Licences**

Because the criteria of unimpeachable character are generally precisely defined in special laws that take unimpeachable character as a qualification requirement, and because unimpeachable character relates to the absence of a conviction for specified criminal offences, it is obvious that compliance with this requirement can be easily determined from the EPR and that the applicant does not have much scope to question its assessment. The applicant can theoretically object that his/her records in the PR are incorrect (e.g. incorrect length of sentence), which would result in an incorrect EPR, or that the EPR contains (otherwise correct) records from the PR database that should only be displayed in the CPR (e.g. expunged convictions). In that case the PR reviews the matter and if the applicant's objection is justified, a new and correct EPR is issued.

It is also worth mentioning that the Czech Constitutional Court has ruled against an unreasonably broad definition of 'unimpeachable character' in an individual law<sup>100</sup> (see Section 3.2), which can be seen as a kind of legal protection for citizens against insufficiently strict legal requirements for licences. This is why the following text briefly summarizes the main features of legal protection for applicants or holders of licences in the Czech Republic.

Decisions on granting or revoking a licence are administrative decisions (administrative acts) in the Czech Republic, with the relevant proceedings being governed by the Code of Administrative Procedure (*správní řád*, CAP).<sup>101</sup> The only instances in which the provisions of the CAP do not apply are when special laws have self-contained special regulations or exclude the application of the CAP for certain issues.<sup>102</sup>

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99 Article 51 paragraph 7 of Act no. 137/2006 Coll., on public procurement, as amended.

100 Constitutional Court judgment no. Pl. ÚS 35/08; Constitutional Court judgment no. Pl. ÚS 38/04.

101 Act no. 500/2004 Coll., the code of administrative procedure.

102 Jemelka, Pondělíčková & Bohadlo 2008, p. 1-8.

The applicant for a licence acts or may act at several stages of the proceedings. The administrative authority must allow the person to exercise their rights and protect their justified interests.<sup>103</sup> Everyone has the right to explain his/her views on a matter relating to them personally, as well as to the documents and other materials that the administrative authority assesses, and to propose other documents or materials.<sup>104</sup> The CAP also imposes a duty on the administrative authority to instruct persons adequately as to their rights and duties and, where needed, about the nature of the administrative act and the person's personal situation.<sup>105</sup>

The application procedure is governed by Section VI of the CAP, which describes the commencement and the course of the proceedings in detail. The procedure is initiated on application, which must, *inter alia*, state clearly the purpose of the person's application.<sup>106</sup> It should be mentioned that the trend is to create uniform application forms (that can be completed online), so there is not much room for an applicant to express opinions beyond the necessary prerequisites of the application form. If the application does not contain all the necessary prerequisites or if it has other shortcomings, the administrative authority must help the applicant to eliminate them immediately or invite the applicant to eliminate them in good time.<sup>107</sup> As a rule, a decision on an application is issued in writing.<sup>108</sup> The applicant (and other interested persons) is notified of the written decision when it is handed to them.<sup>109</sup>

The CAP allows the applicant to appeal against a decision on an application. The appeal procedure is governed by Section VIII of the CAP. The appeal must provide information on the decision against which it is directed and the alleged contravention of the relevant regulation or the alleged defect in the decision or procedure.<sup>110</sup> In the appeal procedure, the appellate administrative authority can take new facts and evidence into account only if the applicant was unable to present or suggest them before the decision was made.<sup>111</sup> The appeal must be lodged within 15 days after notification of the decision, unless a special law states otherwise.<sup>112</sup> The CAP also governs the course of the appeal procedure and the appeal decision. The specific remedy against a decision issued by the central administrative authority, the Minister, the State Secretary or the head of another central administrative

103 Article 4 paragraph 4 of Act no. 500/2004 Coll., the code of administrative procedure, as amended.

104 Hendrych 2012, p. 362.

105 Article 4 paragraph 2 of Act no. 500/2004 Coll., the code of administrative procedure, as amended.

106 Article 45 paragraph 1 of Act no. 500/2004 Coll., the code of administrative procedure, as amended.

107 Article 45 paragraph 2 of Act no. 500/2004 Coll., the code of administrative procedure, as amended.

108 Article 67 paragraph 2 of Act no. 500/2004 Coll., the code of administrative procedure, as amended.

109 Article 72 paragraph 1 of Act no. 500/2004 Coll., the code of administrative procedure, as amended.

110 Article 82 paragraph 2 of Act no. 500/2004 Coll., the code of administrative procedure, as amended.

111 Article 82 paragraph 4 of Act no. 500/2004 Coll., the code of administrative procedure, as amended.

112 Article 83 paragraph 1 of Act no. 500/2004 Coll., the code of administrative procedure, as amended.

authority acting as the body of first instance is the *rozklad*. The Minister or head of another central administrative authority decides on the *rozklad*.<sup>113</sup>

CAP also provides remedies against a decision that has already become final. They are the review procedure (Section IX) and recommencement of a procedure (Section X). In the review procedure, the administrative authority reviews final decisions *ex officio* in cases where there is a reasonable doubt that the decision is in accordance with the legal regulations.<sup>114</sup> Recommencement of a procedure comes into play if:

- a. unknown facts or evidence has emerged that existed at the time of the previous procedure, but the applicant was unable to present or suggest them or the evidence presented proved to be false;
- b. the decision that was used as the basis for the appeal has been revoked or changed;
- c. and the new situation could lead to a different resolution of the issue that was the subject of the decision-making.<sup>115</sup>

If the decision has become final and there is no question of a review procedure or recommencement of the procedure, the applicant can refer the matter to a court. The proceedings before the administrative courts are governed by the Code of Administrative Courts Procedure (*soudní řád správní*, CACP).<sup>116</sup> The administrative courts decide, among other things, on legal actions against decisions taken in public administration by the administrative authority, including the administrative authorities of local government units.<sup>117</sup> The regional court usually acts in these proceedings. The decision of a regional court becomes final when the written decision is delivered to the parties in the proceedings.<sup>118</sup> The CACP offers two remedies against decisions by administrative courts, the nullity plea and the recommencement of a procedure (Section III). In the nullity plea, the applicant can request revocation of a final decision of a regional administrative court.<sup>119</sup> The Supreme Administrative Court (*Nejvyšší správní soud*, SAC) decides on the nullity plea. The recommencement of a procedure comes into play if facts or evidence emerge that the applicant, through no fault of his own, could not present or suggest in the previous procedure, or if a decision on the preliminary question was changed and the result of the recommenced procedure could be more favourable to him.<sup>120</sup>

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113 Article 152 of Act no. 500/2004 Coll., the code of administrative procedure, as amended.

114 Article 94 paragraph 1 of Act no. 500/2004 Coll., the code of administrative procedure, as amended.

115 Article 100 paragraph 1 of Act no. 500/2004 Coll., the code of administrative procedure, as amended.

116 Act no. 150/2002 Coll., the code of administrative courts procedure.

117 Article 4 paragraph 1 item a) of Act no. 150/2002 Coll., the code of administrative courts procedure, as amended.

118 Article 7 paragraph 1, Article 54 paragraph 5 of Act no. 150/2002 Coll., the code of administrative courts procedure, as amended.

119 Article 102 of Act no. 150/2002 Coll., the code of administrative courts procedure, as amended.

120 Article 111 of Act no. 150/2002 Coll., the code of administrative courts procedure, as amended.

We conclude this section by mentioning the means of legal protection available to a licence holder in relation to the monitoring (inspection) authorities. These means are usually defined in laws regulating the conditions for obtaining and retaining the licence in question. They include the direct rights of a licence holder in the monitoring process as well as limitations on the powers of monitoring authorities. Their main goal is to avoid the unlawful revocation of a licence.

For example when carrying out their monitoring tasks, the employees of TLOs must identify themselves by presenting a special card or by written authorization to carry out the inspection. The entrepreneur has the right to ask for a third person chosen by him/her to be present during the inspection.<sup>121</sup>

### 3.2.5.2 Subsidies

Chapter 3.2.2 explained that there is no direct screening of an applicant's potential criminal background in the subsidy procedure. As for the general means of legal protection offered to subsidy applicants, the question is whether the subsidy should be granted through the state budget. If so, the Budgetary Rules Act excludes the application of the CAP's provisions for granting a subsidy, including the subsidy decision, meaning that the legal protection provided by the CAP and described above does not apply. However, any procedure involving the withdrawal of a subsidy granted earlier is governed by the CAP, including the remedies provided by the CAP. If the subsidy was granted through public sources other than the state budget, the CAP is applicable, with possible exceptions or modifications designated by special laws for individual public aid programmes. Note that the related legal regulations usually state that there is no automatic legal claim to an award of public aid.

### 3.2.5.3 Tenders

The specific means of legal protection for suppliers are set in the PPA, which distinguishes between the supplier's objections<sup>122</sup> and a review of the conduct of a contracting authority.<sup>123</sup> The supplier that is – or was – interested in obtaining a particular public contract and whose rights are being or have been harmed due to an alleged breach of the legislation by the conduct of the contracting authority is free to submit justified objections to that authority. Objections can be submitted against all of the contracting authority's conduct, including a decision by the contracting authority to exclude the supplier from the award procedure.<sup>124</sup> A contracting authority reviews such objections to the full extent and sends

121 Article 60b, 60c of Act no. 455/1991 Coll., on trading, as amended.

122 Article 110, 111 of Act no. 137/2006 Coll., on public procurement, as amended.

123 Article 113-119 of Act no. 137/2006 Coll., on public procurement, as amended.

124 Article 110 of Act no. 137/2006 Coll., on public procurement, as amended.

the complainant a written decision, with reasons, within ten days of receipt. If the contracting entity upholds the objections, it will also include a decision on the remedy. If the contracting authority does not uphold the objection, it will notify the complainant in writing of the latter's right to petition the Office for the Protection of Competition (OPC) to commence proceedings reviewing the conduct of the contracting entity (a complainant who does not opt to submit objections may not refer the same matter to the OPC).<sup>125</sup>

A supplier may petition the OPC to review any acts on the part of the contracting authority that have caused harm or that risk causing harm to the rights of the petitioner, e.g. the tender requirements, exclusion from an award procedure, the decision on the most suitable tender etc.<sup>126</sup> The PPA also governs the OPC's assessment of the conduct of a contracting authority as well as how the OPC rules on a petition.<sup>127</sup> A participant in a concession procedure has similar legal protection.<sup>128</sup>

The final decision in a public contract or a concession procedure is subject to review by the administrative courts<sup>129</sup> (see Section 3.2.5.1).

### 3.2.6 *Existing measures on screening and/or monitoring legal persons*

There are no special administrative measures in the Czech Republic on screening or monitoring legal persons for possible involvement in a criminal activity. Administrative law regulations govern the functioning of legal persons (including their responsibility for administrative offences), usually together with natural persons or with natural persons conducting entrepreneurial activities. They often impose a duty on legal persons and natural persons (entrepreneurs) in the same provision, and levy the same sanctions for violating this duty, regardless of the nature of the legal person.

We must mention that Czech law recognizes the criminal responsibility of legal persons, introduced by means of the Legal Persons Criminal Responsibility Act<sup>130</sup> of 1 January 2012. The Act governs the conditions of criminal responsibility of legal persons, the punishments and protective measures applicable to them, and proceedings against them.<sup>131</sup> One of the consequences is that a legal person's conviction for a criminal offence is recorded in the PR, which makes it possible to assess whether a legal person applying for a certain licence,

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125 Article 111 of Act no. 137/2006 Coll., on public procurement, as amended.

126 Article 114 of Act no. 137/2006 Coll., on public procurement, as amended.

127 Article 115-119 of Act no. 137/2006 Coll., on public procurement, as amended.

128 Article 12 paragraph 3, Article 24a-26 of Act no. 139/2006 Coll., on concession contracts and concession procedure, as amended.

129 Jurčík 2007, p. 449-450.

130 Act. no. 418/2011 Coll., on criminal responsibility of legal persons and proceedings against them.

131 Fenyk & Smejkal 2012.

public aid or public contract has an unimpeachable character, as in the case of a natural person.

### 3.3 INSTRUMENTS DIRECTED AT PREVENTING THE DISTURBANCE OF PUBLIC ORDER

#### 3.3.1 *Legal framework*

Beyond the realm of criminal law, public order in the Czech Republic is protected through administrative law. In general terms, the basic preventive tool of public authority in the field of public order is legislation, which sets conditions for undertaking different activities in the public space that eliminate the chance of public order being disturbed as much as possible. While the state and its administrative bodies are usually the competent authorities to grant licences etc. (when regional or local authorities are involved in granting licences, they have delegated competence to do so), the role of municipalities in protecting public order is very important. The Municipalities Act<sup>132</sup> gives municipalities separate competence to impose duties through their own form of legal regulation, the generally binding decree (*obecně závazná vyhláška*, GBD).<sup>133</sup> The municipalities are entitled to impose duties in a GBD:

- a. to maintain local public order; for example by determining which activities that could disturb public order in the community or be contrary to good morals, safety, health and property can only be carried out at a place and time designated by the generally binding decree or by determining that such activities are prohibited in some public areas in the municipality;
- b. to organize, conduct, and terminate publicly accessible sporting and cultural events, including dances and discotheques, by setting binding conditions to the extent necessary to ensure public order;
- c. to ensure the cleanliness of streets and other public spaces, environmental protection, green spaces in urban and other public green spaces, and the use of community facilities that serve the needs of the public;
- d. if stipulated by a special act.<sup>134</sup>

<sup>132</sup> Act no. 128/2000 Coll., on municipalities.

<sup>133</sup> The power of municipalities to issue generally binding decrees also stems from Article 104 paragraph 3 of the Czech Constitution. Pavlíček & Hřebejk 1994, p. 254-256.

<sup>134</sup> Article 10 of Act no. 128/2000 Coll., on municipalities, as amended.

The capital city of Prague has the same powers as stipulated in the Capital City of Prague Act.<sup>135</sup>

The municipalities make extensive use of the GBD, with GBDs meant to maintain public order being plentiful. Municipalities most often issue GBDs to protect public order from prostitution,<sup>136</sup> excessive alcohol consumption,<sup>137</sup> begging,<sup>138</sup> and noisy cultural events,<sup>139</sup> with some of them issuing more comprehensive GBDs concerning multiple problems at once.<sup>140</sup> In the past few months, many municipalities have decided to regulate gambling in their area through GBDs.<sup>141</sup>

The increasing awareness of negative phenomena connected with gambling contributed to this development, but as has also the resolution of fact that just recently the question of as to whether municipalities are entitled to use limit through the GBD to limit in their area the running the operation of all types of gaming machines (including so called interactive video-lottery terminals, IVTs) has been solved in their area. Gambling is governed by a special Lotteries and Similar Games Act (zákon o loteriích a jiných podobných hrách, LSGA), which gives municipalities special powers to issue GBDs stipulating that certain betting games (including gaming machines) can be operated only in certain places and at certain times, or to prohibit the operation of such games in their area completely.<sup>142</sup> Until the end of 2011, the relevant provision of the LSGA referred only to regulating 'gaming machines'. Since the LSGA defines gaming machines more narrowly in the section on authorizing the operation of gaming machines, with IVTs not being included in this definition,<sup>143</sup> it was not clear whether the special municipal powers could be applied to IVTs. The Constitutional Court later explained that the narrower definition should be applied only in the authorization

135 Article 44 paragraph 3 of Act no. 131/2000 Coll., on the capital city of Prague, as amended. As the capital, Prague has a specific position. From an administrative perspective it is a region, divided into individual municipal districts. At the same time its separate competence is in some ways similar to the separate competence of municipalities – for instance the power to issue a GBD.

136 E.g. Generally binding decree of the capital city of Prague no. 20/2007, to protect public order from the offer and provision of sexual services in public places. Prostitution is not regulated in the Czech Republic – it is neither prohibited nor recognized as a legitimate business.

137 E.g. Generally binding decree of the city of Tábor no. 6/2012, on the prohibition of alcohol consumption in public spaces.

138 E.g. Generally binding decree of the city of Plzeň no. 10/2006, on the delimitation of public spaces where begging is prohibited.

139 E.g. Generally binding decree of the city of Brno no. 12/2011, on the regulation of a public performance of music for the purpose of ensuring public order.

140 E.g. Generally binding decree of the city of Klášterec nad Ohří no. 3/2012, on measures to limit activities disturbing public order.

141 E.g. Generally binding decree of the capital city of Prague no. 10/2013, determining places and times where lotteries and other similar games can be run, and determining measures to limit their propagation.

142 Article 50 paragraph 4 of Act no. 202/1990 Coll., on lotteries and other similar games, as amended.

143 Article 17 paragraph 1 of Act no. 202/1990 Coll., on lotteries and other similar games, as amended.



procedure, and that otherwise a broader definition must be applied that includes IVTs.<sup>144</sup> Consequently, the LSGA has been amended to explicitly delegate power to municipalities to regulate the operation of gaming machines, IVTs and some other betting games.<sup>145</sup>

The Ministry of the Interior and the Constitutional Court have played an important role in developing these local tools for maintaining public order. Although municipalities have separate competence to issue GBDs, the GBD must nevertheless be in accordance with the law. If a GBD contravenes a law, the Ministry of the Interior calls on the municipality to rectify the problem. If the municipality does not address the shortcomings within 60 days, the Ministry will decide whether to suspend the effects of the GBD. If there is an obvious contradiction of human rights and basic freedoms, the Ministry can decide to suspend the GBD without prior warning. The municipality is entitled to object to a decision to suspend a GBD by *rozklad* in an administrative procedure (see Section 3.2.5.1). If the municipality eliminates the shortcomings within the prescribed time, the Ministry will lift its suspension. Otherwise the Ministry will petition the Constitutional Court to cancel the GBD.<sup>146</sup> The Constitutional Court then assesses whether the GBD is compatible with the law and if it finds that the GBD contradicts the law, it can cancel the GBD or part of it.<sup>147</sup>

### 3.3.2 *Administrative offences against public order*

Disturbances of public order that do not qualify as criminal offences are subject to sanctioning in administrative proceedings. For the purposes of this country report, administrative offences against public order can be categorized by perpetrator and by whether the disturbance violates national or local legislation.

The Misdemeanours Act (*zákon o přestupcích*, MA) governs misdemeanours by natural persons. A misdemeanour is culpable behaviour violating or threatening the interests of society that is explicitly labelled a misdemeanour by law, provided that it is not another administrative or criminal offence.<sup>148</sup> Administrative authorities are allowed to impose a sanction or protective measure on the perpetrator of a misdemeanour. Sanctions are: (a) a warning; (b) a fine; (c) a prohibition on undertaking the specified activity; (d) the forfeiture of an item; (e) residence prohibition. Protective measures are: (a) a limiting measure (i.e. prohibition on being in certain public places where alcoholic drinks are served or where

144 Constitutional Court judgment no. Pl.ÚS 29/10, of 14 June 2011.

145 Act. no. 300/2011 Coll.

146 Article 123 of Act no. 128/2000 Coll., on municipalities, as amended.

147 E.g. Constitutional Court judgment no. Pl. ÚS 58/05, of 8 June 2010, on cancelling part of the GBD of the city of Česká Velenice no. 2/2005, on measures to ensure local public order.

148 Article 2 paragraph 1 of Act no. 200/1990 Coll., on misdemeanours, as amended.

public sports or cultural events are held); (b) the confiscation of an item. The MA describes in detail the conditions for imposing sanctions and protective measures.<sup>149</sup>

The MA contains a list of misdemeanours, including those against public order.<sup>150</sup> A person commits a misdemeanour against public order if he/she:

- a. disobeys the instructions of a public officer exercising public authority;
- b. causes a disturbance at night;
- c. raises a public scandal;
- d. pollutes public spaces, a public building or a public utility device<sup>151</sup>, or neglects the duty to clean public places;
- e. intentionally destroys, damages or otherwise unlawfully disposes of a tourist mark or other orientation sign;
- f. breaches conditions imposed to maintain public order during public sporting or cultural events or at recreational or tourist places;
- g. attends an organized sports match with his/her face covered in such a way as to impede identification;
- h. damages or unlawfully occupies public spaces, a public building or a public utility device;
- i. creates a dumping ground without authorization or spreads rubbish beyond places reserved for this purpose.

A breach of the duty to maintain public order stipulated in a municipal GBD constitutes a separate misdemeanour against order in local government matters.<sup>152</sup> The municipalities in which public order was disturbed are authorized to deal with both kinds of misdemeanours, i.e. against public order and against order in local government matters.

Moreover the Municipalities Act (as well as the Capital City of Prague Act) empowers municipalities to impose fines on legal persons and on natural persons conducting entrepreneurial activities for the administrative offence of breaching a duty imposed by local regulations, including a GBD issued to maintain public order.<sup>153</sup>

The role of the municipal police should be mentioned in this respect. The Municipal Police Act (*zákon o obecní policii*, MPA) empowers municipalities to establish a municipal police force mainly to ensure that local public order is preserved within the jurisdiction of the municipality. The municipal police should:

- a. contribute to the protection and safety of persons and property;

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149 Article 11-18 of Act no. 200/1990 Coll., on misdemeanours, as amended.

150 Article 47 of Act no. 200/1990 Coll., on misdemeanours, as amended.

151 "Public utility device" means a public apparatus, facility, system, machine etc., that serves to broad public.

Examples are telecommunications, traffic lights, power station, signal post etc.

152 Article 46 of Act no. 200/1990 Coll., on misdemeanours, as amended.

153 Article 58 paragraph 4 of Act no. 128/2000 Coll., on municipalities, as amended; Article 29 paragraph 1 of Act no. 131/2000 Coll., on the capital city of Prague, as amended.

- b. ensure compliance with the rules of civil coexistence;
- c. ensure compliance with generally binding decrees and orders of the municipality;
- d. participate in maintaining the safety and flow of traffic on the road;
- e. help ensure compliance with legislation governing public order and make provision for resuming compliance if breached;
- f. contribute to crime prevention in the community;
- g. supervise compliance with standards of cleanliness in public places in the municipality;
- h. reveal misdemeanours and other administrative offences that fall within the jurisdiction of the municipality;
- i. provide information about the municipal police at the request of the Ministry of the Interior for statistical data-processing purposes.<sup>154</sup>

As for the legal protection afforded to a person found guilty of an administrative offence, the remedies in cases of misdemeanours are governed partly by the MA and partly by the general provisions of the CAP; and in cases of other administrative offences, the CAP's general provisions on remedies apply (see Section 3.2.5.1).

Administrative offences against public order do not result in the revocation of a licence or disqualification from participating in a subsidy or tender procedure. The loss of unimpeachable character that can lead to these consequences (because compliance with the qualification requirements ceases) follows from a final conviction for certain criminal offences, not from administrative offences. However, it should be noted that some laws stipulate compliance with the rules of public order as one of the conditions for carrying out certain activities.

For instance, the LSGA stipulates that authorization to operate a lottery or other similar game will be issued only if this operation takes place in accordance with legislation and does not disturb public order.<sup>155</sup> Nevertheless, a breach of the conditions for operating such games is punishable only by a fine.

### 3.3.3 *Closure and/or expropriation of premises owing to a disturbance of public order*

As indicated above, administrative offences against public order in the Czech Republic are punishable mainly by a fine, a warning (for misdemeanours committed by natural

<sup>154</sup> Article 1 paragraph 2, Article 2 of Act no. 553/1991 Coll., on municipal police, as amended.

<sup>155</sup> Article 4 paragraph 2 of Act no. 202/1990 Coll., on lotteries and other similar games, as amended.

persons), the forfeiture of an item, or a residence prohibition<sup>156</sup> (a prohibition on undertaking a certain activity cannot be imposed for misdemeanours according to Article 46 para. 2 and Article 47 of the MA). The closure or expropriation of premises owing to a disturbance of public order is out of the question.

The TLA bestows special powers associated with trade carried out in business premises. The Trade Licensing Office is entitled to suspend trade in certain business premises if duties set out in the TLA or special laws were violated or are being violated there in the course of trade. The TLO may suspend trade for a certain amount of time, but not longer than one year.<sup>157</sup> If the entrepreneur does not improve the situation, the TLO can initiate proceedings to revoke his or her trade licence (see Section 3.2.4.1).

It should be noted that the issue of expropriating buildings or corporations is very sensitive in the Czech Republic owing to the violent expropriation of private property in the early years of the communist regime. As a consequence, the instrument of expropriation is only allowed in a very limited range of situations. According to the Charter of Fundamental Rights and Freedoms, the expropriation or compulsory limitation of ownership is only possible in the public interest, on the basis of a law and with compensation.<sup>158</sup> The Expropriation Act stipulates that expropriation is permitted only if it is set out in a special law and only if the public interest in attaining the purpose of the expropriation prevails over the preservation of the owner's rights.<sup>159</sup> Different special laws govern situations where expropriation can be executed in the public interest (public utility constructions, public utility measures on protecting inhabitants and property, defence and security facilities etc.).<sup>160</sup>

### 3.4 SEIZING OF ASSETS

As in the Netherlands, the seizing of assets in connection with criminal activities is mainly the domain of penal law in the Czech Republic. However, procedures in which the state deprives a natural or legal person of assets because of an unlawful act can also be found

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<sup>156</sup> A residence prohibition consists of an order banning a perpetrator from the territory of a municipality or its borough where he/she has repeatedly committed a misdemeanour for a period of time specified in the relevant decision. Generally the perpetrator must leave the relevant municipality and is not allowed to re-enter it for a specified period. If the municipality in question is a perpetrator's place of permanent residence, he/she must still leave it, but the municipal authority can grant him/her short-term residence permission for serious personal reasons (a medical examination, a visit to the public authority etc.).

<sup>157</sup> Article 58 paragraphs 4, 6 of Act no. 455/1991 Coll., on trading, as amended.

<sup>158</sup> Article 11 paragraph 4 of the Charter of basic rights and freedoms.

<sup>159</sup> Article 3 paragraph 1 of Act no. 184/2006 Coll., on deprivation or limitation of the ownership of a land or building, as amended.

<sup>160</sup> E.g. Article 170 of Act no. 183/2006 Coll., on spatial planning and building regulation, as amended.

in administrative law. Such procedures need not be connected with any criminal activity by the person in question, because they apply generally.

Loss of property can be imposed on natural persons as a sanction in misdemeanour proceedings. As mentioned above (Section 3.3.2), one of the sanctions available is the forfeiture of an item.<sup>161</sup> Such forfeiture can be imposed if the item belongs to the perpetrator and (a) was used or designed to commit a misdemeanour, or (b) was obtained by committing a misdemeanour or acquired for an item obtained by a misdemeanour. The forfeiture of an item cannot be imposed if the value of the item is obviously disproportionate to the nature of the misdemeanour. Besides the sanction of forfeiture, the MA also recognizes the protective measure of confiscation.<sup>162</sup> This relates to items that meet the criteria for forfeiture but for which the sanction of a forfeiture cannot be imposed because (a) the item belongs to a perpetrator who cannot be prosecuted for a misdemeanour (e.g. due to his or her age), (b) some or all of the item does not belong to the perpetrator, or (c) the item's owner is unknown. Such an item can be confiscated if the safety of persons or property or any other common interest requires it. The forfeited or confiscated item falls to the state.

Other examples of assets being seized in an administrative procedure due to a breach of a legal duty relate to the protection of markets, consumers or public health. These are governed by special laws for specific areas. For instance the inspectors of the Czech Trade Inspection Authority are obliged to seize products or goods found during inspection that do not comply with the legal regulations and to store them out of reach of the person being inspected. The Director of the relevant Inspectorate of CTIA then decides on the sanction for the administrative offence of offering, selling or storing noncompliant products or goods. The sanction is a fine and forfeiture of the products or goods (or their confiscation, e.g. if they do not belong to the sanctioned person). The forfeited or confiscated products or goods go to the state and are either destroyed or used for humanitarian purposes.<sup>163</sup> Moreover, the CTIA inspector is entitled to order the immediate or later destruction of the products or goods if it is obvious or proven that they are dangerous to human health.<sup>164</sup>

A similar situation applies to agricultural products, food or tobacco products where the Czech Agriculture and Food Inspection Authority (*Státní zemědělská a potravinářská inspekce*, CAFIA) acts as monitoring body. The CAFIA Act assigns monitoring powers to CAFIA and defines the administrative offences, consisting of breaches of legal regulations governing the production and distribution of agricultural products, food or tobacco products.<sup>165</sup> The basic sanction for these offences is a fine, but the CAFIA Act also allows

161 Article 15 of Act no. 200/1990 Coll., on misdemeanours, as amended.

162 Article 18 of Act no. 200/1990 Coll., on misdemeanours, as amended.

163 Article 7b of Act no. 64/1986 Coll., on the Czech Trade Inspection Authority, as amended.

164 Article 7 paragraph 2 of Act no. 64/1986 Coll., on the Czech Trade Inspection Authority, as amended.

165 Article 11 of Act no. 146/2002 Coll., on the Czech agriculture and food inspection authority, as amended.

the forfeiture or confiscation of agricultural products, food or tobacco products. The conditions and procedure are similar to those of the CTIA Act.<sup>166</sup>

Some other special laws also allow the forfeiture or confiscation of certain items (goods) if the relevant person produces, distributes etc. such items (goods) in a way that breaches legal duty in the area governed by these special laws.<sup>167</sup>

### 3.5 OTHER RELEVANT MEASURES

Previous sections of this country report have explained that the administrative approach is not used systematically to combat crime in the Czech Republic. One outcome of this is that there is no unified and integrated legal framework for using administrative procedures to control crime. Administrative measures that could be used for this purpose in the Czech Republic are therefore fragmented; they are governed by a number of different laws that usually only concern a specific area of public administration.

This is why there are other tools in the Czech legal system that the administrative authorities can wield to prevent criminal organizations from using the legal administrative infrastructure for their criminal activities. Legal regulation of these tools is also very fragmented, however, and they are primarily designated for other purposes. This section gives some examples of these tools.

1) Under the CTIA Act, a CTIA inspector who finds a violation of a legal duty that could threaten the life or health of consumers has the power to prohibit the given activity or order the closure of the business premises for up to two working days. If the observed shortcomings are not eliminated within this time, the closure can be prolonged until they have been resolved (without final time limit).<sup>168</sup> The CTIA Act also identifies the powers of CTIA inspectors when carrying out inspections – the power to enter into business premises, to verify the identity of the person subject to inspection, to ask for documents, materials or explanations from these person, etc.<sup>169</sup> Other special laws define similar conditions for the inspection activities and related powers of employees of other government inspection authorities in the Czech Republic – e.g. the State Office for Labour Inspection,<sup>170</sup>

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166 Article 11a-11c of Act no. 146/2002 Coll., on the Czech agriculture and food inspection authority, as amended.

167 For instance Act no. 119/2002 Coll., on firearms and ammunition; Act no. 634/1992 Coll., on consumer protection; Act no. 13/1993 Coll., on customs; Act no. 167/1998 Coll., on addictive substances etc.

168 Article 8 of Act no. 64/1986 Coll., on the Czech Trade Inspection Authority, as amended.

169 Article 4 of Act no. 64/1986 Coll., on the Czech Trade Inspection Authority, as amended.

170 Act no. 251/2005 Coll., on labour inspection.

the Czech Environmental Inspectorate,<sup>171</sup> and the Czech Agriculture and Food Inspection Authority.<sup>172</sup>

2) The Building Act entitles the Building Office to apply different measures when the owner or user of a building seriously breaches his or her duties or when an urgent interest so requires (e.g. the protection of the life and health of people, the environment, public safety etc.).<sup>173</sup> These measures include the power to order: the removal of a building (i.e. the forced demolition of a building),<sup>174</sup> the immediate removal of a building and the necessary securing work,<sup>175</sup> the necessary modification of a building,<sup>176</sup> maintenance of a building,<sup>177</sup> or eviction from a building (by issuing an eviction order, the Building Office can force all persons dwelling in the building to vacate it immediately if the building's state of repair poses an imminent threat to the life or health of people or animals, or if the Office intends to issue an order for the immediate removal of a building or for the necessary securing work).<sup>178</sup> The employees of the Building Office have the power to enter grounds and buildings to assess their state of repair or to gather evidence and other materials for administrative proceedings.<sup>179</sup>

At the end of April 2012 a new nightclub opened in the centre of Prague that led to strong emotions. Such clubs are not unknown in the Czech Republic, including in Prague, but in this case prostitutes lured clients by posing in windows half-naked. Moreover, the club was located in the middle of a residential district and near a kindergarten, so it became the subject of many complaints from local residents. Given the fact that prostitution is not regulated in the Czech Republic, the municipality did not have any direct tool available to shut down the club. However, in May 2012 employees of the Building Office of Prague inspected the club and found that construction work had been carried out without a permit and that the building was not being used for the purpose for which it had been approved. They decided to order an immediate eviction from the building. Although the appellate authority later revoked this decision for procedural reasons, the building's owner did not conclude a new

171 Act no. 282/1991 Coll., on the Czech environmental inspectorate and its competence in forest protection.

172 Act no. 146/2002 Coll., on the Czech agriculture and food inspection authority.

173 Hegenbart & Sakař 2008, p. 351-367.

174 Article 129 of Act no. 183/2006 Coll., on spatial planning and building regulation, as amended.

175 Article 135, 136 of Act no. 183/2006 Coll., on spatial planning and building regulation, as amended.

176 Article 137 of Act no. 183/2006 Coll., on spatial planning and building regulation, as amended.

177 Article 139 of Act no. 183/2006 Coll., on spatial planning and building regulation, as amended.

178 Article 140 of Act no. 183/2006 Coll., on spatial planning and building regulation, as amended.

179 Article 172 of Act no. 183/2006 Coll., on spatial planning and building regulation, as amended.

tenancy contract with the club operator, and the building is now being turned to offices and a musical centre.<sup>180</sup>

3) The Public Health Protection Act gives public health protection authorities the power to decree extraordinary measures, e.g. concerning hazardous products. They can, for instance, prohibit the distribution of certain products.<sup>181</sup> The Regional Hygiene Stations of a given region have the same power.<sup>182</sup> The Act also governs the powers of employees of public health protection authorities, including the power to enter business premises or other buildings, to make visual records, to inspect documents, etc.

### 3.6 CONCLUSION

This country report identifies administrative measures that can be used in the Czech Republic to prevent the operation of criminal groups within the legal administrative infrastructure. In classifying these measures, this report has respected the structure determined by the researchers conducting the study. It is obvious that despite the absence of an 'administrative approach' in form of systematic administrative measures and activities in relation to serious and organized crime, there are a number of potential tools available. The problem is that the efficient use of these fragmented tools, which are only partly fit for purpose, demands a high level of expertise and commitment by public administrators.

Since these tools have been established by a number of different laws, the officials responsible for an administrative approach would need to have extensive knowledge of the content and application of different regulations in many different areas of administrative law. In the current situation, where officials usually specialize only in a specific area related to the competence of the authority for which they work, this is not realistic. The solution may be to assemble multi-agency teams under the leadership of, for instance, the officials responsible for coordinating crime prevention. Methodological guidance by the state administrative authorities (the ministries, etc.) would also be of great importance. They could provide public administrators at regional and local level with instructions on which tools can be used for a given purpose in specific situations.

A second problem is that the law does not explicitly impose a duty on officials to actively search for and use these 'non-standard' instruments. The extent to which these instruments

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180 See e.g. Místo nevěstince budují Ve Smečkách hudební dům (<http://www.novinky.cz/domaci/283600-misto-nevestince-buduji-ve-smeckach-hudebni-dum.html>); Úředníci nařídili vyklidit nevěstinec Ve Smečkách (<http://www.novinky.cz/domaci/268549-urednici-naridili-vyklidit-nevestinec-ve-smeckach.html>).

181 Article 95 of Act no. 258/2000 Coll., on public health protection, as amended.

182 Article 85 of Act no. 258/2000 Coll., on public health protection, as amended.



are used in practice thus depends vitally on the motivation and activity of the individual officials or individual administrative authorities.

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## 4 THE ADMINISTRATIVE APPROACH IN ENGLAND AND WALES

*M. Peters & A.C.M. Spapens*

### 4.1 INTRODUCTION

In 2009 the Netherlands distributed a questionnaire exploring which instruments other European Union Member States employ as non-penal measures to prevent criminals from using legal infrastructures.<sup>1</sup> The questionnaire and the subsequent *Hungary Handbook* revealed that the United Kingdom uses alternative instruments to tackle crime, including some administrative measures.<sup>2</sup> In this country report, we will focus on England and Wales. It has been completed in January 2014. The following main question is posed:

*which possibilities exist in England and Wales to prevent the use of legal infrastructures by serious and organized criminals?*<sup>3</sup>

For the substantial instruments, focus will lie completely on the territory of England and Wales.<sup>4</sup> However, the discussions on general administrative law and criminal policy also include the whole of the United Kingdom, as these regulations (wholly or partly) encompass further territories than just England and Wales in the United Kingdom. We will first discuss the limitations of the report further with respect to the administrative authorities and the geographical limitations in this Section. We then contemplate the administrative powers of government in England and Wales (Section 4.2) and current policy on serious and organized crime in the UK, including Scotland and Northern Ireland (Section 4.3). Finally, we consider the substantive instruments related to an administrative approach to crime (Section 4.4).

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1 5655/09 CRIMORG 10, p. 4.

2 Home Office 2004; Cabinet Office 2009.

3 Serious crime: offences committed by one or more persons for a prolonged or indefinite period of time, which offences are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly a financial or other material benefit. Europol 2013, p. 41-42.

4 The reader should bear in mind that the instruments as described below are not always primarily meant to prevent organized crime from infiltrating into the legal infrastructure, but can have other purposes as well.

### Limitations to the research

The legal system of the UK, i.e. common law, posed certain issues for this country report. What follows is a working definition of administrative law and administrative authorities and then a description of the administrative measures on which this report will focus.

### The common law and the definition of administrative law and administrative authorities

Until fairly recently, there was no real distinction in the UK between public and private law.<sup>5</sup> According to Cane, no “consciously articulated distinction” between public and private law existed in the UK until the 1970s. This absence of distinction was influenced by Dicey,<sup>6</sup> until certain procedural changes occurred. These changes led in 2001 to the establishment of the Administrative Court for England & Wales.<sup>7</sup>

The UK does not have general legal codes on administrative law or consistent legal principles applicable to administrative actions, sanctions or bodies.<sup>8</sup> For historical reasons, e.g. as a legacy of the industrial revolution, administrative bodies cannot be typically classified: “the circumstances surrounding the creation of the agency or administrative decision-maker very often may determine the range of remedies that are available. Many administrative bodies utilize economic instruments or fiscal arrangements to implement their policies.”<sup>9</sup>

Furthermore, there are neither codes governing conduct by administrative authorities nor legal principles governing their actions, and there is no general description of what constitutes an administrative decision-maker. For the purposes of this country report, we must identify what should be classified as:

1. administrative law;
2. administrative authorities.

Our definition of *administrative law* and consequentially the *administrative authorities* acting through it is based on the book *Administrative Law* by Cane.<sup>10</sup> With regard to the substance of administrative law, a distinction can be made in the United Kingdom between an institutional and functional approach.<sup>11</sup> The institutional approach focuses on the actions of the bodies and agencies of local and central government.<sup>12</sup> The functional approach, which is the main approach in the United Kingdom, focuses on whoever performs

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5 Cane 2004, p. 11-12; McEldowney 2013, p. 603.

6 Cane 2004, p. 11-12.

7 Cane 2004, p. 12; <http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court>.

8 McEldowney 2013, p. 603.

9 McEldowney 2013, p. 603.

10 Other terminology exists as well, see Craig 2003, p. 96ff. The distinction made by Cane is however the most workable for the purposes of this country report.

11 Cane 2004, p. 2-3.

12 Cane 2004, p. 3.

the functions of government.<sup>13</sup> In the functional approach, there are two types of government. They are the ‘core public authorities’, i.e. government entities performing government functions, and ‘hybrid public authorities’, consisting of non-government entities performing government functions.<sup>14</sup> This distinction was brought about in part by the reform of many government functions under Thatcher in the 1980s.<sup>15</sup> For this report, we will focus on instruments and authorities that fall under both ‘core public authorities’ and ‘hybrid public authorities’. This means that we define administrative law and administrative authorities broadly.

### **Administrative measures**

The foregoing implies that those bodies that we classify under the above definition as administrative authority can apply a wide variety of measures. These measures can be based on criminal law,<sup>16</sup> but civil-law instruments can also be used to enforce actions.<sup>17</sup> In this country report, however, we concentrate solely on the options open to administrative authorities to perform actions in line with the definition of the ‘administrative approach’ adopted in this study. We refer to the general introduction to this research.

Using this definition, we quickly discovered that the UK legal system has an abundance of regulatory bodies, inspectorates, and so on.<sup>18</sup> For practical reasons, we have selected certain administrative bodies based on a questionnaire sent to the UK representative to the EU’s ‘Informal network on the administrative approach’, who gave us a list of the most relevant administrative bodies and their respective powers. The completed questionnaire and the list of administrative bodies have been added as Annex I.

## **4.2 ADMINISTRATIVE AUTHORITIES AND THEIR POWERS – AN OVERVIEW**

### **Types of public authorities**

As mentioned above, the privatization of government functions – a process that commenced in the 1980s – has left the United Kingdom with a wide variety of government institutions.<sup>19</sup> The privatization process involved reviewing the proper functions of local government, the general theme being that these functions should be opened up to market forces and

13 Cane 2004, p.4-5; *R v Panel on Takeovers and Mergers, ex p. Datafin Plc* [1987] QB 815.

14 Cane 2004, p. 5-6.

15 Cane 2004, p. 5-6.

16 For instance the by-laws can be enforced through criminal law. McEldowney 2013, p. 592. See also the Regulation Enforcement and Sanctions Act 2008.

17 McEldowney 2013, p. 587. See also the Regulation Enforcement and Sanctions Act 2008.

18 McEldowney 2013, p. 590-591 and 603.

19 See for instance Craig 2003, p. 117-120 and Craig 2008, p. 169ff.

efficiency, resulting in services being put out to competitive tendering and outsourcing.<sup>20</sup> Local government is basically viewed as a service enabler, not as a service provider.<sup>21</sup> The distinction between private institutions and government institutions is hence not always perfectly clear.<sup>22</sup> Moreover, many traditional functions of local government have been transferred to numerous agencies with responsibility across a wide spectrum of subjects, such as social security, customs and excise and the prison service.<sup>23</sup> The growth of different government bodies has resulted in the Public Bodies Act 2011. This Act allows ministers to abolish or merge governmental bodies with the intention to cut costs.<sup>24</sup>

Local authorities are elected directly by the public and – apart from the process of privatization – carry out a wide range of government functions.<sup>25</sup> Nowadays this includes public-sector housing, schools, public health and sanitation, welfare services, and town and country planning.<sup>26</sup> Local governments fall under the Department for Communities and Local Government<sup>27</sup> and are created by Acts of Parliament.<sup>28</sup> Their powers and duties can be scrutinized by the courts through judicial review,<sup>29</sup> which will be discussed in the final part of this section. The structure of local government is not straightforward, since there have been recent radical changes to that structure, topped by many different forms of authorities, such as County Councils, metropolitan districts, district councils, the unitary authorities and the Greater London Authority along with London boroughs.<sup>30</sup> However, it is beyond the scope of this report to discuss these changes and different forms.

### **Powers of public authorities and enforcement**

Public authorities, i.e. specialized bodies and local government, can implement statutes adopted by the UK Parliament.<sup>31</sup> Local authorities have the power to make by-laws.<sup>32</sup> Furthermore, branches of government are allowed to inspect the manner in which a particular activity has been carried out and whether statutory standards have been complied with.<sup>33</sup> Local and central government can also be subject to financial inspection.<sup>34</sup>

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20 Craig 2008, p. 175.

21 Craig 2008, p. 175-176.

22 Thompson & Jones 2012, p. 185.

23 Thompson & Jones 201, Craig 2008 p. 186; Craig 2003, p. 54-58 and p. 91ff. In March 2000, about 1035 non-departmental public bodies were counted. See Craig 2003, p. 95. Craig 2008, p. 169.

24 Thompson & Jones 2012, p. 187; McEldowney 2013, p. 586.

25 Craig 2008, p. 180-182.

26 Thompson & Jones 2012, p. 188.

27 Thompson & Jones 2012, p. 185.

28 Thompson & Jones 2012, p. 187.

29 Thompson & Jones 2012, p. 187.

30 Thompson & Jones 2012, p. 187.

31 Thompson & Jones 2012, p. 190-192.

32 Thompson & Jones 2012, p. 190-192.

33 Thompson & Jones 2012, p. 194.

34 Thompson & Jones 2012, p. 194.



Public authorities furthermore have the power of licensing. These licences are commonly issued at the local level.<sup>35</sup> Licences can be used as an instrument to enforce or maintain standards, raise revenue or to regulate the sheer number of persons engaged in a certain activity.<sup>36</sup> Licensed activities at a local level include the provision of taxi services, the selling of alcohol and the running of a public cinema, theatre or sex shop. Drivers' licences and permits for the operation of air passenger routes are issued at the national level.<sup>37</sup> A special case concerns environmental licences, which are issued by both local and central authorities as well as by the Environment Agency.<sup>38</sup>

Licences may impose conditions on the applicant concerning standards to be met prior to the issuing of the licence as well as the manner in which the licensed activity may take place.<sup>39</sup> If a licence application is refused, an applicant may appeal or ask for judicial review.<sup>40</sup> The legislation on which licensing is based usually contains enforcement provisions, such as prosecution for criminal offences, powers of closure regarding licensed premises and the power to revoke a licence.<sup>41</sup> Important for this country report is the fact that these powers depend on the underlying legislation and can therefore differ per statute and its underlying subject. Public authorities enforce statutory standards, which mainly fall within the competence of the local authorities.<sup>42</sup> The authority has the discretion to decide which steps to take in an individual case, within the limits of their statutory powers. As previously mentioned, some statutes require the local authority to inspect whether the statutory standard has been upheld, for instance with respect to housing conditions.<sup>43</sup>

The following procedure applies when the authorities discover that a statutory standard has not been upheld.<sup>44</sup>

1. The findings (based upon inspection or otherwise) are reported to the local authority;
- 2A. The local authority (members), a designated committee or officer with delegated powers takes a decision. Normally this implies notifying the person concerned that he must comply with the relevant standards.
- 2B. Some statutes allow for immediate criminal proceedings; however, usually an informal warning is issued first.

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35 Thompson & Jones 2012, p. 195.

36 Thompson & Jones 2012, p. 195.

37 Thompson & Jones 2012, p. 195.

38 Thompson & Jones 2012, p. 195.

39 Thompson & Jones 2012, p. 195.

40 Thompson & Jones 2012, p. 195.

41 Thompson & Jones 2012, p. 195.

42 Thompson & Jones 2012, p. 198. E.g. the Environmental Protection Act 1990 imposes a duty on local authorities to take action when premises are 'in such state as to be prejudicial to health or a nuisance'.

43 Thompson & Jones 2012, p. 198-199.

44 Thompson & Jones 2012, p. 198-201.

3. If the authority chooses to notify, the officer responsible will prepare the notice either in writing or in the form the relevant statute prescribes.<sup>45</sup> The statutory procedures must be followed correctly, since failure is likely to invalidate the decision.<sup>46</sup> The notice states the rights of appeal when provided for.<sup>47</sup> When the notice requires action on the part of the person notified, only the minimum action necessary to comply with the statutory standards may be specified in the notice,<sup>48</sup> as well as a reasonable time to carry out the work.
- 4A. If the notice is not complied with, the local authority has the power to act in default of the relevant party. Before doing so, the local authority needs to respect the timeframe given in the notice. Furthermore, it may only carry out the minimum work required to comply with the terms of the notice. Normally, the local authority can recover the costs incurred as a civil debt in summary proceedings before the local magistrates or alternatively before the ordinary civil courts.<sup>49</sup>
- 4B. The local authority may also be empowered by the specific statute to prosecute the offender for not complying with the statutory standard. Sometimes it may even be possible to start criminal proceedings in parallel with notification. This is allowed in – for example – Section 290 (6) of the Public Health Act 1936.<sup>50</sup> In other cases, criminal proceedings become possible when the person notified fails to comply in time with the statutory notice, for example as under the Environmental Protection Act 1990, Section 80.<sup>51</sup>

When exercising the power of notification and the power to act in default, local authorities are also empowered to enter private property when necessary for public officials to carry out their duties.<sup>52</sup> Local authorities are also allowed to ask the court for private law injunctions in the public interest<sup>53</sup> in order to prevent the infringement of the public's rights, for instance public nuisance affecting the health of the district or the continued flouting of a by-law or other legislation.<sup>54</sup> Alternatively, the local authority may acquire

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45 Thompson & Jones 2012, p. 199.

46 E.g. *Bexley London Borough v. Gardner Merchant PLC* [1993] COD 383.

47 *Rayner v. Stepney Corporation* [1911] 2 Law Report Chancery Division 312.

48 *Welton v. North Cornwall District Council* [1977] 1 WLR 570.

49 Thompson & Jones 2012, p. 199.

50 Thompson & Jones 2012, p. 199.

51 Thompson & Jones 2012, p. 200.

52 Entry into private property is strictly regulated in England. See *Entick v Carrington* [1765] 19 State Trails 1030.

53 Section 222 Local Government Act 1972: For the promotion or protection of the interests of the inhabitants of their area.

54 Thompson & Jones 2012, p. 200.

standing by acting in conjunction with the Attorney-General.<sup>55</sup> If an injunction is ignored, this is regarded as contempt of court, for which a person can be fined or imprisoned.<sup>56</sup>

### **Judicial review**

Apart from non-judicial review,<sup>57</sup> government decisions can be subject to judicial review.<sup>58</sup> It is beyond the remit of this report to discuss the full extent of the judicial review process, but some general remarks are appropriate here regarding this process and its meaning in the scope of UK administrative law.

The Administrative Court<sup>59</sup> is a branch of the High Court and consists of judges specializing in administrative law. Its jurisdiction is to ensure that public bodies observe the law, fulfil their public duties and do not act beyond the scope of their powers.<sup>60</sup> Rulings of the Administrative Court are an extension of the supremacy of Parliament, which is doctrine in the UK. When the Administrative Court holds that a local authority has exceeded its powers, it is merely enforcing the will of Parliament.<sup>61</sup> After all, Parliament has only allowed the authority to apply the power to the extent that Parliament itself has envisaged.

Judicial review must not be confused with appeal against an administrative or other decision. Review concerns the lawfulness of decisions rather than their factual merits.<sup>62</sup> Review is also a last resort remedy. If a statute allows an appeal to be lodged with a higher authority than the initial decision-making authority, this may affect the availability of judicial review.<sup>63</sup>

When administrative law refuses or grants a judicial review, appeal is normally possible before the Court of Appeal at the Civil Division. Appeal against the decision of the Court of Appeal may be lodged with the Supreme Court.<sup>64</sup> In rare cases, the Court of Appeal can be trumped and the claimant can appeal directly before the Supreme Court.<sup>65</sup> For each appeal, permission or leave is necessary either from the court that issued the relevant decision, or from the court to which the appeal will be submitted.<sup>66</sup>

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<sup>55</sup> Thompson & Jones 2012, p. 200.

<sup>56</sup> Thompson & Jones 2012, p. 200.

<sup>57</sup> Ombudsmen and tribunals, see Thompson & Jones 2012, p. 201-206.

<sup>58</sup> Thompson & Jones 2012, p. 206-230. See also: Marique 2013.

<sup>59</sup> Established in 2000.

<sup>60</sup> Thompson & Jones 2012, p. 206.

<sup>61</sup> Thompson & Jones 2012, p. 207.

<sup>62</sup> Thompson & Jones 2012, p. 207-208. *Kemper Reinsurance Company v. Minister of Finance* [2001] 1 AC 1 at 14-15.

<sup>63</sup> *R v. Inland Revenue Commissioners, ex parte Preston* [1985] AC 835 at 852.

<sup>64</sup> Thompson & Jones 2012, p. 208-209.

<sup>65</sup> Thompson & Jones 2012, p. 208-209.

<sup>66</sup> Thompson & Jones 2012, p. 208-209.

The procedural rules for filing a claim regarding the review of the lawfulness of an enactment or decision, action or failure to act in the exercise of a public functions are found in Part 54 of the Civil Procedure Rules.

When the Administrative Court upholds a claim, it may impose a number of discretionary remedies, three of which are unique to public law.<sup>67</sup> To begin with, the Court may quash the order, where another ‘inferior court, person or body exercising powers of a judicial or quasi-judicial nature is ordered to have its decision quashed.’ Second, the Court can issue a prohibition order, but only as a temporary measure. The order can be issued together with a quashing order, for instance to simultaneously quash a previous decision and to prevent future decisions. Third, the Court may issue a mandatory order to a person or body to carry out a public duty.<sup>68</sup> Remedies outside public law are the granting of injunctions or declarations. The Court can also grant damages, restitutions and the recovery of a sum of money, although this is not common practice and such grants cannot be the sole claim at the stage of judicial review.<sup>69</sup>

The grounds on which judicial review can take place are divided into three main categories, namely the illegality, or unlawfulness of a decision,<sup>70</sup> the irrationality or unreasonableness of a decision<sup>71</sup> and procedural impropriety.<sup>72</sup> We will not discuss these grounds here.

Now that we have briefly explored the scope of administrative law in the United Kingdom, we will turn to the background of its approach to serious and organized crime as a whole.

#### 4.3 BACKGROUND OF THE CURRENT POLICIES ON SERIOUS AND ORGANIZED CRIME IN THE UNITED KINGDOM

This section describes the background of the policies on serious and organized crime in the United Kingdom. Administratively, the nation comprises four countries: England, Wales, Scotland and Northern Ireland. Each country has adopted its own policy towards serious and organised crime.

##### **England & Wales**

In England & Wales, several policy papers have been published to guide the workings of the former Serious and Organized Crime Agency (SOCA) and its successor, the National

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67 Thompson & Jones 2012, p. 210.

68 Thompson & Jones 2012, p. 210.

69 Thompson & Jones 2012, p. 210-211. This would be a matter for an ordinary private law claim.

70 Thompson & Jones 2012, p. 220-222.

71 Thompson & Jones 2012, p. 222-226.

72 Thompson & Jones 2012, p. 226-230.

Crime Agency (NCA). To begin with, in 2004, the white paper *One step ahead* was published. The paper marked the establishment of the SOCA as well as Her Majesty's Revenue and Customs (HMRC) and the UK Border Agency (UKBA).<sup>73</sup> The white paper introduced new powers and regulations for law enforcement, such as asset recovery and Serious Crime Prevention Orders (SCPO).<sup>74</sup> Furthermore, it called for law enforcement agencies to improve their collective understanding of organized crime by establishing the UK Threat Assessment and Police Regional Intelligence Units.<sup>75</sup> In 2009 the UK government published the policy document *Extending our Reach*.<sup>76</sup> Chapter 2 of *Extending our Reach* called for expansion of the traditional law enforcement instruments used in the battle against organized crime to include other tools, such as administrative, regulatory and tax tools. According to the policy, government departments throughout the entire public sector should cooperate closely. Chapter 6 of *Extending our Reach* is highly relevant for the purposes of this country report. It describes the tools and instruments available to create 'a hostile environment for serious and organized criminals'. This includes criminal and civil law as well as administrative means to disrupt crime activities.<sup>77</sup> The approach aims to target the environment in which criminals operate by shutting off opportunities for them to exploit.<sup>78</sup> The policy paper underlines that organized criminals interact with government agencies and the legitimate economy, more specifically at the local level.<sup>79</sup> The government should therefore focus on these local interactions by using local sources of intelligence to create a hostile environment for organized crime.<sup>80</sup> In 2011, a subsequent strategy, *Local to Global*, also stressed the importance of using the full range of government powers to tackle and disrupt criminal activities.<sup>81</sup>

Research by Levi shows that the non-traditional approach in the United Kingdom can be divided into three main categories, namely: 1) community approaches,<sup>82</sup> 2) regulatory

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73 Cabinet Office 2009, p. 1.

74 Cabinet Office 2009, p. 1.

75 Cabinet Office 2009, p. 2.

76 Cabinet Office 2009, p. 1.

77 Cabinet Office 2009, p. 45.

78 Cabinet Office 2009, p. 4.

79 Cabinet Office 2009, p. 43-44.

80 Cabinet Office 2009, p. 43-44.

81 HM Government 2011.

82 Including the types of intervention: (1) community crime prevention, (2) passive citizen participation and (3) active citizen participation.

disruption and non-justice system approaches<sup>83</sup> and 3) private-sector approaches.<sup>84,85</sup> Within these three categories, sixteen ‘types of interventions’ or instruments can be identified.<sup>86</sup> However, when reviewing these types of interventions in detail, only a small portion can be described as ‘administrative’ as defined in this research. Instead, most interventions refer to civil proceedings, community policing and citizen involvement.<sup>87</sup> The same applies to the policy document *Extending our Reach*.<sup>88</sup> It too emphasizes civil recovery and fiscal strategies. Nevertheless, besides the use of civil and fiscal powers, the local regulatory authorities’ powers are also used to disrupt criminal activity,<sup>89</sup> although their inclusion is kept to a minimum.<sup>90</sup>

In October 2013 the NCA replaced the SOCA, following the Crime and Courts Act 2013.<sup>91</sup> The NCA (unlike the SOCA) is an operational crime-fighting agency with broad tasks relating to tackling organized crime, strengthening the UK borders, fighting fraud and cybercrime and protecting children.<sup>92</sup> It has both a crime-reduction function<sup>93</sup> and a criminal intelligence function.<sup>94</sup> Coinciding with the launch of the NCA, the *Serious and Organized Crime Strategy* (hereafter: NCA Strategy)<sup>95</sup> outlines the UK’s current approach to organized crime.<sup>96</sup> The NCA Strategy is based on four pillars: ‘pursue’, ‘prevent’<sup>97</sup>,

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83 Including the types of intervention: (1) regulatory policies, programmes and agencies (domestic and foreign), (2) faster customs and other regulatory treatment for firms and countries that have instituted approved internal compliance programmes, (3) Routine and suspicious activity reports as investigative triggers for illegal drug precursors and money laundering, (4) tax policy and programmes, (5) civil injunctions and other sanctions, (6) military interventions, (7) security and secret intelligence services and (8) foreign policy and aid programmes.

84 Including the types of intervention: (1) individual corporate responses, (2) professional and industry associations, (3) special private-sector committees, (4) anti-ID fraud and money laundering software and (5) private policing and forensic accounting.

85 Levi & Maguire 2004, p. 411.

86 Levi & Maguire 2004, p. 411.

87 Levi & Maguire 2004, p. 411.

88 Cabinet Office 2009, particularly Chapter 6.

89 Levi & Maguire 2004, p. 413. Also, a (then) SOCA officer mentioned in a telephone interview that as a term, ‘administrative’ entails more or less the powers of local authorities in the United Kingdom.

90 According to the response to the Questionnaire of the European Commission in 2009.

91 <http://www.nationalcrimeagency.gov.uk/about-us>.

92 <http://www.soca.gov.uk/about-soca/national-crime-agency>; <https://www.gov.uk/government/policies/reducing-and-preventing-crime--2>.

93 Article 1 paragraph 4 and 6 to 11 Crime and Courts Act 2013.

94 Article 1 paragraph 5 Crime and Courts Act 2013.

95 HM Government October 2013.

96 HM Government October 2013.

97 Mainly focused on tools for education and deterring people already engaged in organized crime (including lifetime management), such as Serious Crime Prevention Orders, Travel Restriction Orders etc. This falls outside the scope of this country report. One interesting aspect however is the introduction of licences for Private Detectives. This regime will be rolled out from the autumn of 2014 onwards and can therefore not yet be discussed in this report. HM Government October 2013, p. 10-11 and 48-52.

‘protect’, and ‘prepare’,<sup>98</sup> for which strategic objectives have been listed.<sup>99</sup> The first two pillars aim to reduce crime threats, whereas the latter two aim to reduce vulnerability to crime.<sup>100</sup>

The NCA Strategy emphasizes once again the importance of collaboration between government bodies.<sup>101</sup> This ‘partnership working’ through Community Safety Partnerships (CSPs) will be discussed at length in Section 4.4. The NCA Strategy also addresses the need for better data-sharing between government departments and agencies, such as the Trading Standards and the Environment Agency, through the existing Regional Organized Crime Units (ROCUs) and the strategic Government Agency Intelligence Network (GAIN).<sup>102</sup> The ROCUs and GAIN are primarily law enforcement agencies, but collaborate with other government agencies, such as the Environment Agency.<sup>103</sup> Again, these organizations and local cooperative bodies will be discussed in Section 4.4. The NCA Strategy further calls for legislation to create new powers for the seizing of criminal assets.<sup>104</sup>

The ‘protect’ pillar of the NCA Strategy underlines – among other things<sup>105</sup> – the protection of the national and local government against serious and organized crime.<sup>106</sup> This entails tackling fraud in the public sector<sup>107</sup> as well as the misuse of public procurement activities at the local level.<sup>108</sup> The latter will be addressed by implementing the European Directive on public procurement and additional legislation directed at ensuring the appropriate checks to exclude companies involved in organized crime.<sup>109</sup> Part of the ‘protect’ pillar is also the notion that certain professions, including within government and law enforcement, can be subject to corruption or bribery. The Bribery Act 2010 was adopted as part of the anti-corruption policy.<sup>110</sup> One measure meant to tackle corruption is the development of a stronger system for vetting police officers when hired or promoted.<sup>111</sup> The substantive strategies and instruments will be addressed below in Section 4.4.

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98 This pillar focuses on emergency services, vulnerable communities and victims of crime. This falls outside the scope of this report. HM Government October 2013, p. 11-12.

99 HM Government October 2013, p. 7-8.

100 HM Government October 2013, p. 25.

101 HM Government October 2013, p. 9, 25 and 28.

102 HM Government October 2013, p. 9 and 29.

103 HM Government October 2013, p. 29.

104 HM Government October 2013, p. 9.

105 Other policy initiatives within the ‘protect’ pillar include physical protection against crime, strengthening borders, the containment of fraud and cyberattacks against government and identity theft. These policies fall outside the scope of this report. HM Government October 2013, p. 11.

106 HM Government October 2013, p. 53.

107 HM Government October 2013, p. 53.

108 HM Government October 2013, p. 11 and 53.

109 HM Government October 2013, p. 11 and 53.

110 HM Government October 2013, p. 59-60.

111 HM Government October 2013, p. 59-61.

## Scotland

In Scotland, the Serious Organized Crime Taskforce (SOCT) published the strategy *Letting our communities flourish. A strategy for tackling serious organized crime in Scotland* in June 2009.<sup>112</sup> The SOCT cooperates with the (former) SOCA,<sup>113</sup> the HMRC<sup>114</sup> and other bodies. The strategy emphasizes the role of the SOCT, but at the same time calls on other public agencies, business and individuals to take responsibility.<sup>115</sup> Substantively, the focus is on reducing the harm caused by crime and on turning Scotland into a hostile environment for criminals.<sup>116</sup> Four objectives are identified, namely ‘divert’, ‘disrupt’, ‘deter’ and ‘detect’.<sup>117</sup> One of the key elements of the strategy is “Going beyond law enforcement – involving business, local authorities and communities.”<sup>118</sup>

While there is no mention of an ‘administrative approach to crime’ per se in the strategy, intrinsically the strategy is aimed at such an approach, stating: “This is not just a role for law enforcement agencies. Local authorities, professional bodies and others can make a crucial *difference by spotting and reporting suspicious activity, or using their own powers* (italics added) to help disrupt serious organized crime.” The strategy continues by saying that local authorities in particular have powers to issue (and revoke or refuse) licences in such areas of business as taxis, pubs, restaurants, night-clubs, and can furthermore use powers in their capacity as landlords and revenue collectors.<sup>119</sup> The strategy also stresses the central role of organizations such as the NCA, HMRC and the UK Border Agency in accessing information.<sup>120</sup>

A new agency, the Serious Organized Crime & Procurement Sub Group, was also founded to ensure that government tenders are not granted to companies linked to crime.<sup>121</sup> So far, the Group has established an intelligence sharing service for public sector agencies and assisted in identifying the sectors most vulnerable to serious organized crime.<sup>122</sup> Finally, the strategy envisages more information exchange and collaboration between law enforcement, business, local government and others.

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112 The Serious Organised Crime Taskforce 2009.

113 Now NCA.

114 The Serious Organised Crime Taskforce 2009, p. 3.

115 The Serious Organised Crime Taskforce 2009, p. 3.

116 The Serious Organised Crime Taskforce 2009, p. 4.

117 The Serious Organised Crime Taskforce 2009, p. 4.

118 The Serious Organised Crime Taskforce 2009, p. 4.

119 The Serious Organised Crime Taskforce 2009, p. 14.

120 The Serious Organised Crime Taskforce 2009, p. 14. As well as their enforcement powers.

121 The Serious Organised Crime Taskforce 2009, p. 17; <http://www.scotland.gov.uk/Publications/2010/06/01111748/1>; The Serious Organised Crime Taskforce 2010.

122 <http://www.scotland.gov.uk/Publications/2010/06/01111748/1>; The Serious Organised Crime Taskforce 2010.



## Northern Ireland

In Northern Ireland, the Northern Ireland Assembly has had the power to regulate most of the criminal justice functions since April 2010.<sup>123</sup> Here we will discuss its policy on organized crime. In 2000, the Organized Crime Task Force in Northern Ireland (OCTF N-I) was established in which agencies participate on a voluntary basis.<sup>124</sup> Its most recent strategy paper concerns the period of 2012-2014.<sup>125</sup> The OCTF N-I advocates a multi-agency approach and includes the UK central government, the Northern Ireland Government, law enforcement, prosecutors, communities and businesses.<sup>126</sup> It has incorporated the UK's national strategy as published by the SOCA, but at the same time focuses on its specific local issues.<sup>127</sup> The strategy has three core objectives, namely: (1) make Northern Ireland a hostile environment for organized criminals, (2) inform the public of organized crime trends and report on the work of the Organized Crime Task Force, (3) support Northern Ireland communities affected by organized crime.<sup>128</sup> The partners should share and analyse relevant information, taking into account the issue of sensitive information.<sup>129</sup> Another objective is to update and amend the existing legislation where necessary because of the devolution process.<sup>130</sup> Although the strategy does not explicitly mention local authorities or the application of administrative instruments to tackle or prevent crime, it is clear that this is part of the strategy. However, because of the on-going process of devolution and transfer of powers, the strategy is still developing.

## Comparison

On policies concerning serious and organized crime, the four countries in the UK have similar approaches. These include a partnership approach involving law enforcement agencies as well as other public agencies, communities and businesses. Furthermore, the focus lies on sharing intelligence between these agencies as well as on creating a hostile environment for organized criminals. The strategies in England & Wales and Scotland explicitly mention the option of an administrative approach to crime, whereas the Northern Ireland strategy does not. This can be explained by devolution and the reliance on the SOCA strategy, which indirectly introduces an administrative approach into the strategy of Northern Ireland.

In conclusion, it is clear that a policy encompassing the use of administrative instruments in the fight against organized crime has started to develop in the United Kingdom. The

123 Organised Crime Task Force Northern Ireland 2012, p. 10.

124 <http://www.octf.gov.uk/>, Organised Crime Task Force Northern Ireland 2012, p. 3

125 Organised Crime Task Force Northern Ireland 2012.

126 Organised Crime Task Force Northern Ireland 2012, p. 3-4 and 11-12.

127 Organised Crime Task Force Northern Ireland 2012, p. 5.

128 Organised Crime Task Force Northern Ireland 2012, p. 6.

129 Organised Crime Task Force Northern Ireland 2012, p. 9.

130 Organised Crime Task Force Northern Ireland 2012, p. 10.

substantive nature of these instruments will be discussed further in the next section. For practical reasons, we limit our description to the instruments applicable in England & Wales. The instruments specifically applicable in Northern Ireland and Scotland fall outside the scope of this report.

#### 4.4 SUBSTANTIVE INSTRUMENTS

As explained above, the UK has a wide range of administrative instruments that can be applied in the context of preventing and tackling serious and organized crime. In the context of this report, it was necessary to narrow down the overview to the most relevant instruments. We consequently took the *Hungary Handbook* as our starting point.<sup>131</sup> The European Commission published the *Handbook* in 2009, based on self-reports by the Member States regarding administrative approaches to crime.

The UK report identified substantive instruments in civil law, tax law, new branches of criminal law and administrative law without making a clear distinction between the different fields. This obviously follows on from the fact that UK law draws no clear distinction between public and private law, as discussed in Section 4.2. Second, we received an overview of the administrative authorities with which the NCA cooperates as well as the underlying legislation. The list is based on the SOCA compendium,<sup>132</sup> which presents an overview of the different instruments the SOCA (and now the NCA) uses to fight serious and organized crime.<sup>133</sup> The compendium itself is classified and could not be obtained for the purposes of this study. Finally, the UK representative to the EU's informal network on the administrative approach completed a specific questionnaire (see Annex I).

This section first discusses the instruments for preventive screening and monitoring of persons, including the options of disclosure and barring of persons (Section 4.4.1.1) and the screening of persons in the context of money-laundering regulations (Section 4.4.1.2). Second, we describe the regulations that enable the national and local authorities to access information for screening purposes, i.e. the relevant provisions of the Crime and Courts Act (Section 4.4.2.1), the Suspicious Activity Report System (Section 4.4.2.2) as well as the conditions under which local government can apply multi-agency approaches to tackle crime problems (Section 4.4.2.3). Third, we explore the statutory possibilities for closing premises (Section 4.4.3) and for seizing assets outside the scope of a criminal procedure (Section 4.4.4). Last, we discuss other regularly used tools (Section 4.4.5).

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131 10899/11 JAI 380 COSI 44 CRIMORG 77 ENFOPOL 179.

132 <http://www.soca.gov.uk/about-soca/how-we-work/new-approaches>.

133 Hereafter, we will use the abbreviation NCA instead of the (former) SOCA to prevent confusion, unless otherwise and specifically indicated.

#### 4.4.1 Possibilities for screening and monitoring of persons

##### 4.4.1.1 Disclosure and barring of persons

This section discusses the main instruments for vetting persons in England & Wales. The procedure refers to the vetting of persons in the context of licences and tenders as well as the screening of potential employees, with the focus being on the latter.<sup>134</sup>

England & Wales introduced procedures for vetting employees as early as in 1750.<sup>135</sup> At that time Henry Fielding developed a *Universal Register Office*, giving employers access to the backgrounds and character references of potential employees.<sup>136</sup> Since then, the vetting and screening of applicants and employees by employers, particularly those working with vulnerable adults and children, has been expanded vastly.<sup>137</sup> The establishment of the Disclosure and Barring Service (DBS) is the most recent and relevant development.

#### The Disclosure and Barring Service

The DBS started operating on 1 December 2012 and provides a proportional central vetting service for the UK, with the exception of Scotland.<sup>138</sup> It includes the former Criminal Records Service (CRS) and the Independent Safeguarding Authority (ISA). The former CRS was responsible for checking a person's criminal record, while the ISA vetted and – if necessary – barred persons who applied for jobs involving working with children and other vulnerable groups.<sup>139</sup> The DBS can only require registration of persons who are involved in 'regular activity' with vulnerable groups.

A DBS check is requested as part of a pre-recruitment check, regarding an offer of employment, volunteer positions or for specific licences.<sup>140</sup> It can also be included in a tender procedure.<sup>141</sup> The primary objective of the DBS is to help employers make safer recruitment decisions, to prevent unsuitable people from working with vulnerable persons, and to make safer licensing and tender decisions. In doing so, the DBS allows employers and other organizations to request criminal record checks (including cautions, reprimands and final warnings) on potential employees.<sup>142</sup>

<sup>134</sup> See for instance: Levi & Maguire 2004

<sup>135</sup> Mustafa, Kingston & Beeston 2012, p. 16. See also: Thomas & Hebenton 2013, p. 228-234.

<sup>136</sup> Mustafa, Kingston & Beeston 2012, p. 16.

<sup>137</sup> For a full overview of the development of vetting and screening in England and Wales, please refer to Mustafa, Kingston & Beeston 2012, p. 15-30.

<sup>138</sup> [www.gov.uk](https://www.gov.uk/government/organizations/disclosure-and-barring-service), under Home Office; Cabinet Office 2011. <https://www.gov.uk/government/organizations/disclosure-and-barring-service>. In comparison with – apparently – the ISA. Disclosure Scotland has jurisdiction in Scotland. For Northern Ireland, the criminal records disclosures are managed by the AccesNI, the DBS has a function as making the barring decisions regarding Northern Ireland.

<sup>139</sup> Cabinet Office 2011.

<sup>140</sup> DBS eligibility guidance version 2.2 (November 2013), p. 1. Via [www.gov.uk](http://www.gov.uk).

<sup>141</sup> Cabinet Office 2011.

<sup>142</sup> Disclosure and Barring Service 2013a.

In principle, 'spent' convictions cannot be used as a ground for refusing to employ a person, since this is unlawful under s. 4 of the Rehabilitation of Offenders Act (ROA) 1974.<sup>143</sup> A conviction is 'spent' after a person has served the sentence and a rehabilitation period.<sup>144,145</sup> However, certain areas of employment are exempted from the principle rule that spent convictions cannot be taken into account, as specified in the ROA 1974 (Exceptions) Order 1975.<sup>146</sup> This includes professionals and volunteers working with children and vulnerable adults, and persons working in educational positions, in certain legal professions, in professions in the penal sector, in positions at the Royal Society for the Prevention of Cruelty against Animals (RSPCA) and in professions at financial institutions.

It also applies to persons seeking to carry arms, people or organizations seeking to apply for tenders,<sup>147</sup> football stewards, commissioners for the Gambling Commission and police and Crime Commissioners.<sup>148</sup>

It furthermore applies to the following licences: taxi driver and private hire vehicle licences; National Lottery licences; licences issued under Section 25 of the Children and Young Persons Act 1993;<sup>149</sup> licences issued under section 8 of the Private Security Industry Act 2001; personal or operating licences under Part 5 or 6 of the Gambling Act 2005 and licences under Regulation 5 of the Misuse of Drugs Regulations 2001, Article 3 paragraph 2 of Regulation 2004/273/ EC or Article 6 paragraph 1 of Regulation 2005/111/EC.<sup>150</sup>

The organization requesting the DBS to check a person's background must ensure that it is eligible to do so under the current legal provisions, i.e. the Exceptions Order 1975.<sup>151</sup> The most important legal provisions providing eligibility are summed up in the *DBS guide to eligibility for criminal records checks*.<sup>152</sup> The minimum age for a person to be screened by the DBS is 16 years.<sup>153</sup>

There are currently two types of DBS checks available to employers and organizations granting and revoking licences:

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143 Section 1 of the Rehabilitation of Offenders Act 1974.

144 This rehabilitation period differs per offence. Recently, changes have been made to the rehabilitation period in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. For instance if the original sentence was a prison sentence of more than 30 months, the conviction can never be spent. On the other hand if the person has served a prison sentence shorter than six months, the rehabilitation period is seven years. Thomas & Heberton 2013, p. 238.

145 Thomas & Heberton 2013, p. 237.

146 DBS eligibility guidance version 2.2 (November 2013), p. 1. Via [www.gov.uk](http://www.gov.uk).

147 This will be discussed under Section 4.4.1.3.

148 DBS eligibility guidance version 2.2 (November 2013), p. 3-6. Via [www.gov.uk](http://www.gov.uk).

149 By which is meant persons under the age of 18 travelling abroad for the purpose of performing or being exhibited for profit.

150 DBS eligibility guidance version 2.2 (November 2013), p. 6. Via [www.gov.uk](http://www.gov.uk).

151 DBS eligibility guidance version 2.2 (November 2013), p. 1. Via [www.gov.uk](http://www.gov.uk).

152 Via [www.gov.uk](http://www.gov.uk).

153 Disclosure and Barring Service 2013a.

1. *Standard checks.* A standard DBS check is based on the Rehabilitation of Offenders Act 1974 (ROA) (Exceptions) Order 1975 and includes details of all spent and unspent convictions, cautions, reprimands and final warnings as found in the Police National Computer and which have not been filtered<sup>154</sup> in line with legislation;<sup>155</sup>
2. *Enhanced checks*<sup>156</sup>
  - a. *Enhanced checks (normal).* Whether a position is eligible for an enhanced DBS check is determined by its inclusion in both the ROA Exceptions Order and the Police Act 1997 (Criminal Records) Regulations 2002. Examples are volunteers<sup>157</sup> and professionals caring for, training, supervising or being in charge of children, specified activities with adults who receive health care or social care services, and applicants for gaming and lottery licences.<sup>158</sup> An enhanced check is based on the same records as the standard check, but supplemented with information held locally by police forces.<sup>159</sup>
  - b. *Enhanced checks with children's and/or adults' barred list checks.* A position is eligible for this type of check when the Police Act 1997 (Criminal Records) Regulations 2002 specifically and explicitly permits the barred lists to be checked.<sup>160</sup> This includes, for example, people who apply for Taxi and Private Hire Vehicle (PHV) licences. This screening also includes the children's and/or adults' barred lists. Any information that comes to the DBS regarding these extensive checks needs to be considered by the DBS, as this is its statutory duty.<sup>161</sup> The decision to be placed on the child barred list and/or adult barred list lies with expert caseworkers.<sup>162</sup> These process referrals, made by employers or organizations, about individuals believed to pose a future risk to children and/or vulnerable groups.<sup>163</sup> There is a duty to refer on the part of regulated activity suppliers and personnel suppliers.<sup>164</sup> In addition, the following groups have the power to refer to the DBS under the Safeguarding Vulnerable Groups Act 2006: local authorities; education and library boards; health and

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154 Since 29 May 2013 certain old and minor offences will not be mentioned on criminal record certificates anymore. Disclosure and Barring Service 2013a.

155 Disclosure and Barring Service 2013a.

156 Home Office Framework Document, p. 3.

157 As specifically defined in Section 2 of the Police Act 1997 (Criminal Records) Regulations 2002.

158 Disclosure and Barring Service 2013a.

159 Home Office Framework Document, p. 3; Disclosure and Barring Service 2013a.

160 These lists include persons barred from working with children or vulnerable adults. Home Office Framework Document, p. 3.

161 DBS eligibility guidance version 2.2 (November 2013), p. 1. Via [www.gov.uk](http://www.gov.uk). Moreover: Disclosure and Barring Service 2013a. The person will be notified if he or she is affected by certain information.

162 Disclosure and Barring Service 2013b. This decision can be automatic for certain offences. See: Home Office Framework Document, p. 4.

163 Disclosure and Barring Service 2013b.

164 Disclosure and Barring Service 2013b.

social care trusts;<sup>165</sup> keepers of registers, such as the General Medical Council and the Nursing and Midwifery Council; and supervisory authorities such as the Care Quality Commission.<sup>166</sup>

An interim option exists with regard to persons applying to work with vulnerable adults (under supervision). This is the 'DBS adult first check', which allows for a provisional assessment of a person's criminal records.<sup>167</sup> The option is available to organizations requesting a check of the DBS adult barred list, albeit under strict criteria.<sup>168</sup> One possible outcome is an order to await the full assessment, in which case a match with the adult barred list may have been found. Another outcome is that there is no match for the person on the adult barred list, in which case that person can start working provisionally.<sup>169</sup> It is unlawful to knowingly employ a barred person, either paid or as a volunteer, to engage in a regulated activity with a group from which they are barred. Conversely, a barred person breaks the law if they seek, offer or engage in regulated activity with a group from which they are barred.<sup>170</sup>

Furthermore, the DBS is in the process of developing a new type of check, the 'basic check'. This check will encompass convictions and conditional cautions that are *unspent* under the ROA 1974.<sup>171</sup> Persons may apply for a basic check directly and use it for several purposes, including employment but also certain licensing and insurance purposes.<sup>172</sup>

The DBS vetting procedure is intended for employers (and contracting parties, as discussed in the next section). The registered employer can – as part of its recruitment process – require a criminal records check, the intensity being dependent on the type of work as specified in the categories above. The employer must provide the candidate with a DBS application form, which the candidate must then complete and return to the employer.<sup>173</sup> The applications for DBS checks always need to take place via a registered body. Under certain circumstances,<sup>174</sup> employers may become 'registered bodies' themselves<sup>175</sup> or can lodge their applications via so-called 'umbrella bodies'<sup>176</sup>, which are in turn registered

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165 For Northern Ireland specifically.

166 Disclosure and Barring Service 2013b.

167 Disclosure and Barring Service 2013a.

168 Disclosure and Barring Service 2013a.

169 Disclosure and Barring Service 2013a.

170 Disclosure and Barring Service 2013b.

171 Home Office Framework Document, p. 3.

172 Home Office Framework Document, p. 3.

173 Disclosure and Barring Service 2013a.

174 They have to lodge more than 99 DBS checks a year and be able to ask questions that fall under the ROA 1974 (Exception) Order 1975.

175 For which conditions and fees apply, see: Disclosure and Barring Service 2013a. Employers that lodge at least 1500 applications a year may use an automated system, i.e. the 'e-bulk service'.

176 The employer must be able to ask exempted questions but does not need to lodge more than 99 applications a year.

bodies.<sup>177</sup> In the latter option, an employer asks an umbrella body<sup>178</sup> to undertake the application process; the umbrella body needs to be satisfied that the request for Disclosure is justified. Once it is, it sends out application forms to the individual concerned, including identification checks, and it countersigns the application for Standard Disclosure. The Standard Disclosure is sent to both the umbrella body and the individual applicant within two weeks. The latter forwards the Standard Disclosure to the employer or contracting authority. The umbrella body destroys its copy after six months.<sup>179</sup> An umbrella body therefore provides non-registered bodies access to DBS checks. A list of umbrella bodies is provided on the website of the DBS.<sup>180</sup>

The employer can also register with the competent authority, i.e. the DSB, as a 'registered body' and submit the application itself. It then sends out the application forms to the individual concerned, checking the identification documents and countersigning and forwarding the complete application to the competent authority, after which the registered body and the individual concerned receive their own copies.<sup>181</sup>

After countersigning, the DBS searches the Police National Computer. Where applicable, the children's and adults' barred lists are searched, after which the records held by the local police are searched. Enhanced checks are sent by secure, electronic means to the police for an additional check of local records. After these police checks, a DBS certificate is printed.<sup>182</sup> The certificate includes the time at which it was issued and it has no official expiry date.<sup>183</sup> Certificates become invalid when the status of a person changes due to – for instance – police information.<sup>184</sup> After a thorough check of the identity of the applicant, employers are allowed to accept a DBS check issued previously, but they need to consider that the person may have been subject to new convictions. In addition, the earlier DBS check probably concerned a different position.<sup>185</sup> Since 2013, the DBS has an Update Service, which allows new relevant information to be added. Individuals can subscribe voluntarily for this service.<sup>186</sup>

The checks may also involve overseas applicants, although the DBS cannot access overseas criminal records directly. According to the DBS, the Police National Computer

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177 Disclosure and Barring Service 2013a.

178 These are: "organizations registered by the competent authorities to process Standard Disclosures on behalf of other organizations." Cabinet Office 2011.

179 Cabinet Office 2011.

180 <https://dbs-ub-directory.homeoffice.gov.uk>.

181 Cabinet Office 2011.

182 Disclosure and Barring Service 2013a.

183 Disclosure and Barring Service 2013a. However, for certain positions a new check or periodic checks may be required.

184 <https://www.gov.uk/government/news/100000-subscribers-take-advantage-of-dbs-update-service>.

185 Disclosure and Barring Service 2013a.

186 Home Office Framework Document, p. 3.

also holds a small number of criminal records from overseas.<sup>187</sup> When there are no records available, the DBS directs the employer to the relevant embassies or High Commission for further enquiries. The DBS however plays no role in the foreign procedure.<sup>188</sup> The same is true for any questions regarding foreign certificates of good conduct.<sup>189</sup> Regulations concerning the criminal records checks can be found on the Home Office website, listed by country in alphabetical order.<sup>190</sup>

Employers receiving certificates from the DBS based on standard and enhanced checks must comply with the Code of Practice as (CoP) laid down in s. 122 paragraph 2 of the Police Act 1997.<sup>191</sup> The CoP requires the correct storage of the information, usage of the information only for the purposes for which it was distributed, and a basic retention period of 6 months, after which the information should be destroyed.<sup>192</sup>

Certain groups may dispute DBS certificates if they contain errors or irrelevant or inaccurate information.<sup>193</sup> First, the individual applicant may dispute the certificate. Second, persons who have a legitimate interest in the accuracy of the certificate, including the countersignatory, the employer or a licensing authority, may dispute it.<sup>194</sup> The latter must discuss the reasons for the dispute with the applicant.<sup>195</sup> There are two types of disputes:

- a. a profile dispute. This is when incorrect personal information appears on the DBS certificate;<sup>196</sup>
- b. a disclosure dispute. This may involve the following situations: disclosed conviction information does not relate to the applicant; details of the applicant's disclosed conviction information are incorrect; information approved by the police for disclosure is considered inaccurate or irrelevant.

The DBS will investigate the dispute itself and if it rules in favour of the applicant, a replacement certificate is issued.<sup>197</sup>

In relation to enhanced certificates, an Independent Monitor has been established for the DBS to provide applicants of such certificates with the right of appeal.<sup>198</sup> This appeal can only be lodged against the content of the 'additional information' section of the

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187 Disclosure and Barring Service 2013a.

188 Disclosure and Barring Service 2013a.

189 Disclosure and Barring Service 2013a.

190 <https://www.gov.uk/government/publications/criminal-records-checks-for-overseas-applicants>.

191 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/143662/cop.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/143662/cop.pdf).

192 Disclosure and Barring Service 2013a.

193 Disclosure and Barring Service 2013b.

194 Disclosure and Barring Service 2013b.

195 Disclosure and Barring Service 2013b.

196 Disclosure and Barring Service 2013b.

197 Disclosure and Barring Service 2013b.

198 Home Office Framework Document, p. 12; Disclosure and Barring Service 2013b.



enhanced certificate as obtained via the police forces.<sup>199</sup> Disputes regarding errors or inaccuracies need to be lodged with the DBS, disputes arising from data incorporated into other parts of the certificates than the ‘additional information’ section need to be referred to the police force in question.<sup>200</sup> The Independent Monitor only assesses referrals when the applicant believes that the additional information is not relevant to the job or position applied for or should not be included in the certificate.<sup>201</sup>

The DBS cooperates with the police, the Association of Chief Police Officers (ACPO), the Department for Education, Department of Health, a private company responsible for the administration’s infrastructure and the registered bodies.<sup>202</sup> The DBS, the Home Office, the Department for Education and the Department of Health have concluded a framework document (hereafter: Home Office Framework Document) that aims primarily to set the parameters for cooperation between the concluding parties.<sup>203,204</sup> Indicated (additional) partners in the Home Office Framework Document are the Department for Business Innovation and Skill, HM Passport Office, the police and other government departments and the devolved administrations.<sup>205</sup> No further specifications are made with regard to the sharing of information with these parties.

In conclusion, England and Wales have a standardized procedure for the vetting of persons. However, the information on which this vetting is based consists mainly of criminal records, or – in certain cases – police information and/or a check against a list of barred persons.

### **Specific regulation for screening related to the procurement of government contracts**

Public procurement is regulated in the Public Contracts Regulations 2006 (as amended),<sup>206</sup> which applies to contracting authorities in England, Wales and Northern Ireland.<sup>207</sup> The Regulations implement Directive 2004/18/EC<sup>208</sup> of the European Parliament and Council

199 Disclosure and Barring Service 2013b.

200 Disclosure and Barring Service 2013b.

201 Disclosure and Barring Service 2013b.

202 <https://www.gov.uk/government/organizations/disclosure-and-barring-service/about#who-we-work-with>.

203 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/210857/DBS\\_Framework\\_Document.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210857/DBS_Framework_Document.pdf).

204 Home Office Framework Document, p. 1.

205 Home Office Framework Document, p. 12.

206 Last amended in 2009 by The Public Contracts (Amendment) Regulations 2009, which also implements Article 1 of Directive 2007/66/EC (see also its subsequent Explanatory Note), and in 2011 by the Public Procurement (Miscellaneous Amendments) Regulations 2011, which changed a number of Acts involving time limits for starting court proceedings and updating the number of offences for which an economic operator can be rejected according to Regulation 23 (see hereafter).

207 At the same time the Utilities Contracts Regulations 2006 (as amended) was also introduced. These two regulations are similar. Unless otherwise indicated, reference will be made only to the Public Contracts Regulations 2006.

208 O.J. L 134, p. 114.

of 31<sup>st</sup> March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services contracts.<sup>209</sup>

Regulation 3 of the Public Contracts Regulations 2006 states what is understood under contracting authority, including the Ministers of the Crown, government departments, the House of Commons and the House of Lords, local authorities<sup>210</sup> and fire and police authorities. Other bodies meeting needs in the public interest may also be subject to the Regulations, according to provision 3 paragraph 1 under w.

Regulation 8 determines when the Public Contracts Regulations 2006 applies, i.e. in four different procedures, namely the negotiated procedure (Regulations 13, 14 and 17),<sup>211</sup> the open procedure (Regulation 15),<sup>212</sup> the restricted procedure (Regulation 16)<sup>213</sup> and the competitive dialogue procedure (Regulation 18).<sup>214,215</sup>

Part 4 of the legislation states the provisions for the selection of economic operators by contracting authorities. Economic operators are defined as 'a contractor, a supplier or a services provider'.<sup>216</sup>

Regulation 23 of the Public Contracts Regulations 2006 (as amended)<sup>217</sup> allows the contracting authority the right to either exclude economic operators from a contracting procedure (paragraph 1) or declare them ineligible or decide not to select the economic operator (paragraph 4). Economic operators can be excluded from the tender procedure if they or their directors or any other person who has powers of representation, decision or control of the economic operator are convicted of:

- conspiracy under s.1 of the Criminal Law Act 1977, where that conspiracy relates to participation in a criminal organization as defined in Article 2 paragraph 1 of Council Joint Action 98/733/JHA or Article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983(b), where that conspiracy relates to participation in a criminal organization as defined in Article 2 of Council Framework Decision 2008/841/JHA(c);
- corruption under s. 1 of the Public Bodies Corruption Practices Act 1889 or s. 1 of the Prevention of Corruption Act 1906;

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209 See Explanatory Note to the Public Contracts Regulations 2006.

210 Which are further defined in Regulation 3 paragraph 2.

211 The authority negotiates the terms of contract with selected contracting parties. Craig 2008, p. 152.

212 Any interested party is able to submit a bid. Craig 2008, p. 152.

213 The authority selects parties to place bids. Craig 2008, p. 152.

214 Used for complex contracts. A limited number of parties are allowed to engage in competitive dialogue. Craig 2008, p. 152.

215 Craig 2008, p. 152-153.

216 Regulation 4 paragraph 1 of the Public Contracts Regulations 2006.

217 Identical to provision 26 of the Utilities Contracts Regulations 2006. See: Cabinet Office 2011, via [www.gov.uk](http://www.gov.uk).

- bribery, where the offence relates to active corruption<sup>218</sup> or within the meaning of Section 1 or 6 of the Bribery Act;
- fraud affecting the financial interests of the European Communities under Article 1 of the Convention relation to the protection of the financial interests of the European Union, within the meaning of:
  - the offence of cheating the Revenue;
  - the offence of conspiracy to defraud;
  - fraud or theft within the meaning of the Theft Act 1968 and the Theft Act 1978, the Theft Act (Northern Ireland) 1969 or the Theft (Northern Ireland) Order 1978;
  - fraudulent trading within the meaning of s. 458 of the Companies Act 1985, Article 451 of the Companies (Northern Ireland) Order 1986 or s. 993 of the Companies Act 2006;
  - fraudulent evasion under s. 170 of the Customs and Excise Management Act 1979 and s. 72 of the Value Added Tax Act 1994;
  - an offence in connection with taxation in the European Community within the meaning of s. 71 of the Criminal Justice Act 1993;
  - destroying, defacing or concealing documents or procuring the extension of a valuable security within the meaning of s. 20 of the Theft Act 1968 or s. 19 of the Theft Act (Northern Ireland) 1969;
  - fraud according to s. 2, 3 or 4 of the Fraud Act 2006 or making adapting supplying or offering to supply articles for use in frauds within the meaning of s. 7 of the Fraud Act 2006;
- money laundering within the meaning of s. 340 of the Proceeds of Crime Act 2002, including an offence in connection with the proceeds of criminal conduct within the meaning of s. 93A, 93B or 93C of the Criminal Justice Act 1988, or Article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996 and an offence in connection with the proceeds of drug trafficking within the meaning of s. 49, 50 or 51 of the Drug Trafficking Act 1994;
- any other offence within the meaning of Article 45 paragraph 1 of the Public Sector Directive as defined by the national law of any relevant State.

The Public Procurement (Miscellaneous Amendments) Regulations 2011 has updated the list of offences, including the relevant offences created or consolidated since the making

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<sup>218</sup> 'Active corruption' means corruption as defined in Article 3 of the Council Act of 26 May 1997(n) or Article 3(1) of Council Joint Action 98/742/JHA.

of the regulations.<sup>219</sup> These are included in the list above. The Regulations of 2011 also included debt relief orders and debt relief restriction orders.<sup>220</sup>

According to paragraph 4, a contracting authority may also declare an economic operator ineligible or decide not to select them based on the ground of risks of bankruptcy or insolvency of an individual (under a), partnership (under b) or company (under c). Furthermore, reasons include the conviction of an economic operator for a criminal offence related to his business or profession (under d), the operator having committed an act of grave misconduct in the course of his business or profession (under e), the operator having not fulfilled obligations relating to payment of social security contributions (under f) or taxes (under g). Other reasons are that the operator is guilty of misrepresentation of information as required under the Public Contracts Regulations 2006, has failed to provide the information requested (under h), is not properly licensed in the State in which he should be licensed (under i) in relation to procedures for the award of public contracts, and last, is not registered under the relevant professional or trade register in the relevant State in accordance with paragraph 7, 8 and 9 of Regulation 23.

The list of offences and reasons for ineligibility or a decision not to select an economic operator reflect the provisions of Directive 2004/18/EC.

According to paragraph 5 of Regulation 23, the contracting authority may request the information from the economic operator necessary to decide on the grounds for exclusion, ineligibility or reasons not to select an economic operator. As conclusive evidence, the contracting authority accepts:

- a. an extract from a judicial record or where judicial records are not maintained in the relevant State, a document issued by the relevant judicial or administrative authority of that State;<sup>221</sup>
- b. in relation to the payment of social security or taxes, a certificate issued by the relevant competent authority;
- c. where the documents under a and b are not issued in the relevant State, a declaration on oath made by the economic operator before the relevant<sup>222</sup> judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths.

If the contracting authority requires further information on the economic operator and its relevant convictions as determined by paragraph 1, it may request such information from the competent authority.<sup>223</sup> Under Regulation 26, supplementary or clarifying

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219 As well as inserting offences relevant to Northern Ireland.

220 These are orders which help people pay their debts under certain conditions. Regulation 15, 22 and the Explanatory Note to the Public Procurement (Miscellaneous Amendments) Regulations 2011. See [www.gov.uk](http://www.gov.uk).

221 For the grounds specified in paragraph 1 and 4 under a, b, c or d.

222 In this context relevant means: an authority designated by, or a notary public or Commissioner for oaths in the relevant State in which the economic operator is established. See Regulation 23 paragraph 6.

223 Regulations 23 paragraph 3.

information may be requested relating, for example, to information obtained under Regulation 23. Regulation 23 paragraphs 7, 8 and 9 stipulate when a foreign economic operator is regarded as registered under a relevant trade register. Foreign trade registers accepted as appropriate are listed in Schedule 6. For the purpose of this research, only trade registers in Belgium, France, Germany, Italy, the Netherlands, Spain and Sweden are named as appropriate registers. This means that the trade registers in Poland and the Czech Republic are not listed as relevant trade registers.

The Cabinet Office has released guidelines for contracting authorities that include provisions on which information can be collected from an economic operator for mandatory exclusion from the procurement procedure.<sup>224</sup> The steps the contracting authorities need to take in order to obtain information from tenderers are the following:

1. as a minimum requirement,<sup>225</sup> a statement from the economic operator needs to be obtained declaring that he has not been convicted of any of the offences listed in Regulation 23 paragraph 1. There are standardized forms for such declarations;<sup>226</sup>
2. if the contracting authority is not satisfied with the statement, it can ask for clarification from the economic operator first. If this is still insufficient, the contracting authority can apply for further information from the relevant competent authority in the form of a Disclosure, as described previously.<sup>227</sup> The competent authority for England and Wales is the DSB.<sup>228</sup> When the competent authority is foreign, contact information on that authority can be requested via the Public Procurement Network, an EU-wide informal network of and for public procurement authorities.<sup>229</sup>

Paragraph 2 of Regulation 23 states that a contracting authority may disregard convictions for the list of offences regulated by paragraph 1 if it is satisfied that there are 'overriding requirements in the general interest' that justify disregarding these prior convictions. In such cases, the approval of the Accounting Officer or Minister must be sought.<sup>230</sup> Other information sources, such as information from the Tax Authority, Land Registry or the British Chamber of Commerce, are (apparently) not used in this screening process.

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224 Cabinet Office 2011.

225 The guidelines state that the contracting authorities should apply discretion, as obtaining information from each individual economic operator would be too burdensome.

226 Cabinet Office 2011. This form, however, is not intended to include the preferred subcontractors. Also, parent companies convicted of the offences listed in Regulation 23 are not taken into account, unless they exercise direct control over the first company. The guidelines suggest legal advice in such situations.

227 Cabinet Office 2011.

228 Formerly the Criminal Records Service, [www.gov.uk](http://www.gov.uk), under the Home Office; Cabinet Office 2011.

229 Cabinet Office 2011. See also: <http://www.publicprocurementnetwork.org>. This informal cooperation network on public procurement includes the European Union Member States, candidates and potential candidates to the European Union, EEA countries and Switzerland.

230 Cabinet Office 2011.

Part 9 of the Public Contracts Regulations 2006 (as amended) allows an aggrieved economic operator to lodge an application to the courts if the contracting authority fails to comply with the regulations. Under Regulation 47, the contracting authority has a duty to the economic operator not to breach the provisions as stated in the regulation. These proceedings are held before the High Court.<sup>231</sup> Under circumstances, it is possible to use the procedure of judicial review on grounds of breaches of the regulations.<sup>232</sup>

#### 4.4.1.2 Screening of persons in scope of the Money Laundering Regulations

Certain businesses are monitored by supervising bodies under the Money Laundering Regulations 2007 (as amended).<sup>233</sup> These regulations aim to protect the financial system of the United Kingdom. Regulation 3 determines which kind of businesses fall under the scope of the regulations. These include credit institutions, financial institutions, auditors, tax advisers, high value dealers, casinos and other businesses linked to financial transactions. Regulation 4 lists the exemptions to the regulations, including several government institutions and persons who have incidental engagement in financial activities. Regulation 23 lists the supervisory authorities. This includes the Financial Services Authority (FSA), Her Majesty's Revenue and Customs (HMRC), the Department of Enterprise, Trade and Investment in Northern Ireland (DETI), the Gambling Commission, the Office of Fair Trading (OFT) as well professional bodies regulating a particular profession as listed in Schedule 3 of the Money Laundering Regulations 2007.

In general, the supervisory authorities must monitor the activities of the persons managing the types of businesses assigned to them and secure compliance with the regulations.<sup>234</sup> Moreover, if they suspect a person of money laundering or terrorist financing, they must inform the (former) SOCA promptly.<sup>235</sup>

The HMRC is assigned to maintain a mandatory register of high value dealers, money service businesses and trust or company service providers for which they are the assigned authority.<sup>236</sup> Unless persons are registered as an aforementioned business or provider, they may not act as such.<sup>237</sup> The HMRC refuses to register a person<sup>238</sup> as a money service business, trust or company service provider or cancels such a registration<sup>239</sup> if that person fails the

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231 Neill 2012, p. 63.

232 Neill 2012, p. 63-69.

233 Last amended by the Money Laundering (Amendment) Regulations 2012.

234 Regulation 24 paragraph 1 of the Money Laundering Regulations 2007.

235 Regulation 24 paragraph 2 of the Money Laundering Regulations 2007. At the time of writing, this had not yet been changed to the NCA.

236 Regulation 25 paragraph 1 of the Money Laundering Regulations 2007. See also the Explanatory Note to the Money Laundering Regulations 2007.

237 Regulation 26 of the Money Laundering Regulations 2007.

238 Regulation 28 of the Money Laundering Regulations 2007.

239 Regulation 30 of the Money Laundering Regulations 2007.

'fit and proper' test.<sup>240</sup> Regulation 28 paragraph 2 specifies the situations when this test has been failed. That is in the event of convictions for offences under the Terrorism Act 2000; offences under paragraph 7(2) or (3) of Schedule 3 to the Anti-Terrorism, Crime and Security Act 2001; offences under the Terrorism Act 2006; offences under Part 7 (money laundering) of, or listed in Schedule 2 (lifestyle offences: England and Wales), 4 (lifestyle offences: Scotland) or 5 (lifestyle offences: Northern Ireland) to the Proceeds of Crime Act 2002; offences under the Fraud Act 2006 or, in Scotland, the common law offence of fraud; offences under Section 72(1), (3) or (8) of the Value Added Tax Act 1994; and the common law offence of cheating the public revenue (sub a). The person also fails the test if: he has been declared bankrupt or the sequestration of his estate has been awarded and he has not been discharged (sub b); he is subject to a disqualification order under the Company Directors Disqualification Act 1986 (sub c); he is or has been subject to a confiscation order under the Proceeds of Crimes Act 2002 (sub d); he has consistently failed to comply with the Money Laundering Regulations of 2001, 2003 and/or 2007 (sub e); he has consistently failed to comply with Regulation 2006/1781/EC (sub f); he has effectively directed a business falling under sub e or f (sub g); or he is otherwise deemed not to be a fit and proper person for reasons of money laundering or terrorist financing (sub h). If a conviction is spent under the ROA 1974, as discussed above, such a conviction should be disregarded.

Persons can apply online to be registered and must provide the HMRC with information while doing so.<sup>241</sup> The information provided by the applicant must include business details, personal information, identification details<sup>242</sup>, contact details and the position in the business he holds or intends to hold.<sup>243</sup> The HMRC checks the information provided by the applicant against the HMRC records, records held by other regulatory authorities, government, law enforcement organizations and commercial organizations.<sup>244</sup> This information includes information on whether the application must be refused under Regulation 28, for instance because there are criminal convictions present.<sup>245</sup> If the application for registry is refused, the applicant can appeal this decision.<sup>246</sup>

The FSA,<sup>247</sup> OFT<sup>248</sup> and HMRC<sup>249</sup> may decide whether they will install registers for certain groups not supervised by the Secretary of State, DETI or professional supervisory

240 Regulation 28 paragraph 1 of the Money Laundering Regulations 2007.

241 [www.hmrc.gov.uk](http://www.hmrc.gov.uk).

242 Documents confirming the identity and home address of non-UK residents must be issued. [www.hmrc.gov.uk](http://www.hmrc.gov.uk).

243 [www.hmrc.gov.uk](http://www.hmrc.gov.uk). Form MLR101.

244 [www.hmrc.gov.uk](http://www.hmrc.gov.uk).

245 Regulation 27 of the Money Laundering Regulations 2007.

246 [www.hmrc.gov.uk](http://www.hmrc.gov.uk).

247 This concerns Annex I (on financial institutions) to the Money Laundering Regulations.

248 Consumer credit financial institutions and estate agents.

249 Auditors, external accountants and tax advisers.

bodies.<sup>250</sup> If such a register is established, the persons concerned are required to register if they are to perform the relevant activities for more than six months.<sup>251</sup>

Regulation 24A was inserted under the Money Laundering (Amendment) Regulations 2012. This article allows the various supervisory authorities to disclose information to one another.<sup>252</sup> Such information may not be disclosed further, but serves only to enable the supervisory authorities (both the disclosing and receiving authority) to exercise their tasks for purposes of criminal law or other enforcement proceedings, and as otherwise required by law.<sup>253</sup>

#### 4.4.2 *Access to relevant information by government institutions*

In this section we first discuss the possibility of information exchange on serious and organized crime between national agencies under the Crime and Courts Act 2013 (4.4.2.1). Next, we address how government can obtain information on legal entities by means of Suspicious Activity Reports (SARs) (4.4.2.2). Finally, we look at how local bodies may cooperate in partnerships that facilitate information exchange for combatting crime (4.4.2.3).

##### 4.4.2.1 **The Crime and Courts Act 2013 – the NCA as information gateway**

The Crime and Courts Act 2013 (hereafter: CCA) gives the NCA a key position in the United Kingdom as an information gateway for combatting serious and organized crime.

As discussed in Section 4.3, the NCA has a crime reduction function,<sup>254</sup> a criminal intelligence function<sup>255</sup> and other assigned functions.<sup>256</sup> The Explanatory Note to the CCA illustrates the scope of its crime reduction function. It “relates to securing that efficient and effective activities to combat organized crime and serious crime are carried out (whether by the NCA, other law enforcement agencies, or other persons).”<sup>257</sup> The NCA is able to undertake activities under the scope of this function to detect, prevent, investigate, or otherwise reduce serious and organized crime.<sup>258</sup> Section 1 paragraph 11 CCA and Section

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250 Regulation 32 paragraph 1-4 of the Money Laundering Regulations 2007.

251 Regulation 33 of the Money Laundering Regulations 2007.

252 Regulation 24A of the Money Laundering Regulations 2007 (as amended).

253 Regulation 9 of the Money Laundering (Amendment) Regulations 2012. The Explanatory Note to the Money Laundering (Amendment) Regulations 2012 is rather brief in its discussion of this new power and only mentions that exchange is now possible under certain conditions, without specifying what those conditions are.

254 Section 1 paragraph 4 of the CCA.

255 Section 1 paragraph 5 of the CCA.

256 Section 1 paragraph 3 of the CCA.

257 Explanatory Notes to the Crime and Courts Act 2013, via [www.legislation.gov.uk](http://www.legislation.gov.uk), p. 18 (hereafter: Explanatory Notes CCA).

258 Explanatory Notes CCA, p. 18.



5 of Schedule 1, however, broaden this to ‘any kind of crime’, implying that the NCA has further powers to combat crime, not only serious and organized crime.<sup>259</sup> Furthermore, the crime reduction function also involves cooperation with law enforcement agencies and others.<sup>260</sup>

The criminal intelligence function is defined in Section 1 paragraph 5 CCA and includes:

gathering, storing, processing, analysing and disseminating information relevant to combating serious and organized crime as well as activities to combat any other kind of crime [...].

The scope of both of these functions is broad, based on their respective definitions.

Section 5 of the CCA arranges the general relationship of the NCA with other agencies. The relationship between the NCA and different police authorities is arranged under Section 5 paragraph 1 to 9 of the CCA. Paragraph 10 effectuates Schedule 3 of the CCA. Section 1 of Schedule 3 emphasizes the NCA’s duty to cooperate for the purpose of assisting the following persons: (a) constables in UK police forces; (b) Officers of Revenue and Customs; (c) immigration officers; (d) designated customs officials; (e) members of the Serious Fraud Office and (f) any other persons operating in England, Scotland, Northern Ireland or Wales, charged with the duty of investigating organized crime or serious crime.<sup>261</sup> The above-listed persons, as well as the members of Her Majesty’s armed forces and her Majesty’s coast guard, have a reciprocal duty of cooperation for the purpose of assisting the NCA.<sup>262</sup>

Part II of Schedule 3 of the CCA arranges information exchange to and from the NCA. The *duty* to keep the Director General of the NCA informed as well as to be informed by the Director General is applicable to ‘police forces’<sup>263</sup> and ‘specified bodies’.<sup>264</sup> The term ‘police forces’ refers to chief officers of police forces in England and Wales, Northern Ireland and Scotland, the British Transport Police, Ministry of Defence Police and the Civil Nuclear Constabulary.<sup>265</sup> ‘Specified bodies’ are the Secretary of State, the Director of the Border Revenue and the Director of the Serious Fraud Office.<sup>266</sup> The police forces’ duty to keep

<sup>259</sup> Explanatory Notes CCA, p. 18.

<sup>260</sup> Explanatory Notes CCA, p. 18-19.

<sup>261</sup> Section 1 paragraph 1 and 3 Schedule 3 of the CCA.

<sup>262</sup> Section 1 paragraph 2 and 3 Schedule 3 of the CCA. See also: Explanatory Notes CCA, p. 23.

<sup>263</sup> Section 3 and 4 Schedule 3 of the CCA.

<sup>264</sup> Section 5 – 7 Schedule 3 of the CCA.

<sup>265</sup> Explanatory Notes CCA, p. 23.

<sup>266</sup> Article 7 Schedule 3 of the CCA. The latter is not required to disclose information obtained under Sections 2 paragraphs 2 and 3 of the Criminal Justice Act 1987, meaning information obtained by the Director of the SFO that a natural person is required to produce. This provision emphasises the *nemo tenetur* principle. Section 34 of Schedule 3 allows the list of specified bodies to be amended for the purpose of adding more persons to it.

the NCA informed consists of ‘any information held by that police force, which appears to the chief officers to be relevant to the exercise by the NCA of the crime reduction function, the criminal intelligence function or functions conferred by the Proceeds of Crime Act 2002.’<sup>267</sup> However, the same duty is incumbent on the specified bodies only in connection with ‘the exercise of a relevant function of that body’.<sup>268</sup> Any information requested by the NCA must be disclosed when there is a duty to inform.<sup>269</sup> Vice versa, the NCA has to inform the chiefs of police of each UK police force and each specified body of ‘any information obtained by the NCA in the exercise of any NCA function which appears to the Director General to be relevant to the exercise...of any (relevant<sup>270</sup>) functions.’<sup>271</sup> There is no obligation to inform when the information is obtained, either directly or indirectly, from the other bodies.<sup>272</sup>

In addition to the above bodies’ duty to exchange information with the NCA, Section 7 paragraph 1 of the CCA provides the broad and general option of disclosing information to the NCA:

A person may disclose information to the NCA if the disclosure is made for the purposes of the exercise of any NCA function.<sup>273</sup>

The Explanatory Notes show that this paragraph is intended as a broad information gateway.<sup>274</sup> The only exclusions are persons working in Security Service (MI5), Secret Intelligence Service (MI6) or the Government Communications Headquarters (GCHQ).<sup>275</sup>

When the NCA has obtained information based on one of its functions, it can be utilized for any other of its functions.<sup>276</sup> This implies that when information is obtained under the ‘criminal intelligence’ function, this information can be used for the purposes of ‘crime reduction’.<sup>277</sup> Additionally, the NCA is allowed to disclose information gathered in the

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<sup>267</sup> Section 3 paragraph 1 Schedule 3 of the CCA.

<sup>268</sup> Section 5 paragraph 1 Schedule 3 of the CCA.

<sup>269</sup> Section 3 paragraph 2 and 5 paragraph 2 Schedule 3 of the CCA.

<sup>270</sup> The word ‘relevant’ only appears in Section 6 paragraph 1 Schedule 3 of the CCA.

<sup>271</sup> Section 4 paragraph 1 and 6 and paragraph 1 Schedule 3 of the CCA. The wording of the two articles differs slightly. Where the provision on the exchange of information with police forces addresses the overall functions of the police force, Article 6 paragraph 1 refers to the relevant function of the specified body for the purposes of carrying out activities to combat crime. Obviously, this can be explained by the fact that the specified bodies have functions other than just combating crime, whereas that is the police’s main function.

<sup>272</sup> Section 3 paragraph 3, Section 4 paragraph 2, Section 5 paragraph 3 and Section 6 paragraph 2 Schedule 3 of the CCA.

<sup>273</sup> Explanatory Notes CCA, p. 26.

<sup>274</sup> Explanatory Notes CCA, p. 26.

<sup>275</sup> Section 7 paragraph 2 CCA and Explanatory Notes CCA, p. 26. Information disclosure for these persons is regulated under Section 7 paragraph 10 CCA.

<sup>276</sup> Section 7 paragraph 3 CCA.

<sup>277</sup> Explanatory Notes CCA, p. 26.

exercise of one of its functions when there is a 'permitted purpose'.<sup>278</sup> According to Section 16 paragraph 1:

- [...] 'permitted purpose' means any of the following purposes:
- a. the prevention or detection of crime, whether in the United Kingdom or elsewhere;
  - b. the investigation or prosecution of offences, whether in the United Kingdom or elsewhere;
  - c. the prevention, detection or investigation of conduct for which penalties other than criminal penalties are provided under the law of any part of the United Kingdom or the law of any country or territory outside the United Kingdom;
  - d. the exercise of any NCA functions (so far as not falling within any of paragraphs (a) to (c));
  - e. purposes relating to civil proceedings (whether or not in the United Kingdom) which relate to a matter in respect of which the NCA has functions;
  - f. compliance with an order of a court or tribunal (whether or not in the United Kingdom);
  - g. the exercise of any function relating to the provision or operation of the system of accreditation of financial investigators under section 3 of the Proceeds of Crime Act 2002;
  - h. the exercise of any function of the prosecutor under Parts 2, 3 and 4 of the Proceeds of Crime Act 2002;
  - i. the exercise of any function of:
    - i. the Director of Public Prosecutions,
    - ii. the Director of the Serious Fraud Office,
    - iii. the Director of Public Prosecutions for Northern Ireland, or
    - iv. the Scottish Ministers,
 under, or in relation, to Part 5 or 8 of the Proceeds of Crime Act 2002;
  - j. the exercise of any function of:
    - i. an officer of Revenue and Customs,
    - ii. a general customs official,
    - iii. a customs revenue official,
    - iv. an immigration officer,
    - v. an accredited financial investigator, or
    - vi. a constable,
 under Chapter 3 of Part 5 of the Proceeds of Crime Act 2002;

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<sup>278</sup> Section 7 paragraph 4.

- k. investigations or proceedings outside the United Kingdom which have led, or may lead, to the making of an external order (within the meaning of section 447 of the Proceeds of Crime Act 2002);
- l. the exercise of any function of any intelligence service (within the meaning of the Regulation of Investigatory Powers Act 2000);
- m. the exercise of any function under:
  - i. Part 2 of the Football Spectators Act 1989, or
  - ii. sections 104 to 106 of the Policing and Crime Act 2009;
- n. the exercise of any function relating to public health;
- o. the exercise of any function of the Financial Services Authority;
- p. the exercise of any function designated by the Secretary of State by order, but a function may be designated under paragraph (p) only if the function appears to the Secretary of State to be a function of a public nature [...].

The Explanatory Notes give the following example to illustrate the above power to disclose. The NCA is allowed to disclose information on criminal or suspected criminal activity, for instance by the disclosure of financial information received in a Suspicious Activity Report,<sup>279</sup> to a person or organization outside the NCA, such as a financial institution, for the purpose of preventing or detecting crime.<sup>280</sup> Paragraph 8 of Section 7 furthermore allows police, law enforcement, banks and other financial institutions to share information without breaching an obligation of confidence.<sup>281</sup>

Limitations to disclosure are twofold. First, Section 7 paragraphs 5 to 7 limit the power to disclose by an NCA officer in the context of information obtained under the Proceeds of Crimes Act 2002. This information can only be disclosed if the information had been obtained under the function of the NCA as conferred on it by the Proceeds of Crimes Act 2002.<sup>282</sup> Information obtained under Part 6 of the Proceeds of Crimes Act may not be disclosed<sup>283</sup> unless it concerns persons listed in paragraph 7 of Section 7.<sup>284</sup> Second, Section 7 paragraph 9 and Section 12 paragraph 1 effectuate Schedule 7. Schedule 7 puts restrictions

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279 See paragraph 4.4.2.2.

280 Explanatory Notes CCA, p. 26.

281 Explanatory Notes CCA, p. 27.

282 Section 7 paragraph 5 of the CCA. Section 1 paragraph 3 confers the functions under the Proceeds of Crimes Act 2005 and 'other' functions conferred in the CCA and by further law enactments.

283 Section 7 paragraph 6 of the CCA.

284 This includes (a) the Commissioners for Her Majesty's Revenue and Customs, (b) the Lord Advocate for the purposes of the exercise by the Lord Advocate of the Lord Advocate's functions under Part 3 of PCA 2002 (confiscation: Scotland), (c) any person for purposes relating to civil proceedings (whether or not in the United Kingdom) which relate to a matter in respect of which the NCA has functions, or (d) to any person for the purposes of compliance with an order of a court or tribunal (whether or not in the United Kingdom).

on the disclosure of information relating to the criminal intelligence function of the NCA.<sup>285</sup> This schedule regulates any duty to disclose information by an NCA officer or powers to disclose information given to an NCA officer as enforced under the CCA.<sup>286</sup>

Schedule 7 specifies the following restrictions. Part I involves statutory restrictions. Disclosure of information under Part I of the CCA, particularly Section 6 and 7, cannot be in contravention with the Data Protection Act 1998 or Part I of the Regulation of Investigatory Powers Act 2000.<sup>287</sup>

For the restrictions as encompassed in Part II to IV as discussed hereafter, 'consent' is vital. Section 11 of Schedule 7 determines consent to be:

A consent to disclosure of information under any provision of this Schedule may be given in relation to:

- a. a particular disclosure, or
- b. disclosures made in circumstances specified or described in the consent.

Part II of Schedule 7 regulates restrictions on the disclosure on three particular types of information. Firstly, HMRC information,<sup>288</sup> personal customs information<sup>289</sup> and personal customs revenue information<sup>290</sup> cannot be disclosed unless the relevant authority<sup>291</sup> has given consent.<sup>292</sup> Secondly, social security information<sup>293</sup> cannot be disclosed unless a relevant authority<sup>294</sup> has given consent.<sup>295</sup> Lastly, intelligence service information<sup>296</sup> cannot be disclosed unless a relevant authority<sup>297</sup> has given consent.<sup>298</sup> Further disclosure of these three types of information is prohibited unless the relevant authority has again given

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285 Section 12 paragraph 2 of the CCA.

286 Section 12 paragraph 3 of the CCA. Explanatory Notes CCA, p. 35.

287 Explanatory Notes CCA, p. 35.

288 Section 2 paragraph 3 of Schedule 7 of the CCA.

289 See section 15 paragraph 4 of the Borders, Citizenship and Immigration Act 2009. Section 2 paragraph 3 of Schedule 7 of the CCA.

290 See section 15 paragraph 4 of the Borders, Citizenship and Immigration Act 2009. Section 2 paragraph 3 of Schedule 7 of the CCA.

291 The Commissioners or an officer of Revenue and Customs, the Secretary of State or a designated general customs official or the Director of Border Revenue or a designated customs revenue official. Section 2 paragraph 3 of Schedule 7 of the CCA.

292 Section 2 paragraph 1 Schedule 7 of the CCA.

293 Section 3 paragraph 3 Schedule 7 of the CCA.

294 Including the Secretary of State and the Department for Social Development in Northern Ireland. Section 3 paragraph 3 Schedule 7 of the CCA.

295 Section 3 paragraph 1 Schedule 7 of the CCA.

296 Which means: information obtained from an intelligence service or a person acting on behalf of an intelligence service. Section 4 paragraph 3 Schedule 7 of the CCA.

297 Section 4 paragraph 3 Schedule 7 of the CCA.

298 Section 4 paragraph 1 Schedule 7 of the CCA.

consent.<sup>299</sup> Part III and IV of Schedule 7 specify when a person may disclose information that he has received from a NCA officer ('the original recipient'). In principle, further disclosure is prohibited<sup>300</sup> unless it is for a purpose connected to the functioning of the original recipient or for a permitted purpose as defined under Section 16 paragraph 1 CCA<sup>301</sup> and the Director General has given prior consent.<sup>302</sup> Again exceptions apply when the information concerned has been obtained and disclosed under the Proceeds of Crimes Act 2002.<sup>303</sup>

Lastly, Schedule 7 establishes offences in the event of wrongful disclosure of information by NCA officers or other persons in Part V.

Based on the foregoing, we can conclude the following. First, the scope of when information can be disclosed to the NCA is extremely broad based on Section 7 CCA. Basically, this can include information held by anyone – inside or outside the UK – relating to the functions of the NCA. These functions in itself are also broadly defined.<sup>304</sup> Moreover, for certain government authorities, such as the chiefs of police, an obligation exists to keep the NCA informed. Thus, in theory the NCA has access to all relevant information for the purposes of crime reduction and criminal intelligence. As can be shown by the list provided by an NCA representative in Annex I, the NCA does in fact cooperate with many administrative and other government agencies, ranging from local authorities to the National Fraud Authority and the Gambling Commission. This suggests that in practice, the NCA indeed serves as a hub for input of information. Second, the NCA is allowed to disclose information to parties within and outside the UK within the scope of its – again broadly defined – functions or when there is a permitted purpose. This power to disclose, albeit limited in some instances, is also extensive. These powers make the NCA a true information gateway.

For the purposes of researching an administrative approach to crime, including the possibilities for information exchange, the CCA provisions offer many opportunities to factually receive and retrieve information from the NCA by other EU Member States.

#### **4.4.2.2 Suspicious Activity Reports – information on legal entities**

According to individual responses by the United Kingdom to the 2009 questionnaire distributed on behalf of the European Commission,<sup>305</sup> the monitoring of legal entities and

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299 Section 2 paragraph 2, section 3 paragraph 2 and section 4 paragraph 2 Schedule 7 of the CCA.

300 Section 6 paragraph 1 Schedule 7 of the CCA.

301 Section 6 paragraph 1 Schedule 7 of the CCA.

302 Section 6 paragraph 2 Schedule 7 of the CCA.

303 Section 7 and 8 Schedule 7 of the CCA.

304 Explanatory Notes CCA, p. 18.

305 Summarised in 5655/09 CRIMORG 10 concerning the analysis Administrative/Non-Penal Instruments in various Member States & Proposal Future Steps.

information exchange on legal entities is limited to Suspicious Activity Reports (SARs). This was not mentioned in the 2013 self-report questionnaire.

The implementation of the Third Money Laundering Directive ensured a reporting system under Sections 330 to 334 of the Proceeds of Crime Act (POCA) 2002.<sup>306</sup> When a bank (employee) suspects unusual activity regarding money transfers, he is obliged to file a report with the NCA regarding that suspicious activity.<sup>307</sup> The POCA goes above and beyond the Directive in that it has adopted an ‘all-crimes’ approach, instead of only an obligation to report the proceeds of serious crimes.<sup>308</sup> Moreover, it has introduced criminal liability for failure to report suspicious activity.<sup>309</sup> Section 330 requires four elements for reporting suspicious activity:

1. where a person knows or suspects or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering, he must make a disclosure;
2. the information on which the knowledge or suspicion is based must have come to that person in the course of a business in the regulated sector;
3. he must be able to identify the whereabouts of the person or laundered money, or he must believe, or it must be reasonable to expect him to believe, that the information may assist in identifying the person or the laundered property;
4. the person needs to make a disclosure as soon as it is reasonably practicable to do so.<sup>310</sup>

According to Goldby, larger banks more often use automated systems to monitor transactions and to pick up on unusual ones.<sup>311</sup> When reports on suspicious activity reach the NCA, intelligence products, such as ‘alerts’ are developed. These alerts constitute warnings for business, financial institutions and the industry on serious organized crime and are meant to get the reporting sector to focus on current threats and to review processes and procedures.<sup>312</sup> The SARs output is directed not only at the reporting sector but also at the law enforcement authorities and government departments and agencies,<sup>313</sup> such as Her Majesty’s Revenue and Customs (HMRC).<sup>314</sup> The policy document *Extending our Reach* includes the Department for Work and Pensions, the Driver and Vehicle Licensing Agency (DVLA) and the UK’s Fraud Prevention Service (CIFAS) as government organizations which are able to access information coming from SARs and compare this with information

306 Goldby 2013, p. 2-3.

307 Goldby 2013, p. 8. See also: [www.nationalcrimeagency.gov.uk](http://www.nationalcrimeagency.gov.uk); [https://www.ukciu.gov.uk/\(azakul2rvy-wuqertvfcxvf45\)/saronline.aspx](https://www.ukciu.gov.uk/(azakul2rvy-wuqertvfcxvf45)/saronline.aspx).

308 Goldby 2013, p. 2.

309 Goldby 2013, p. 2.

310 See also Goldby 2013, p. 3.

311 Goldby 2013, p. 7.

312 Goldby 2013, p. 9.

313 Goldby 2013, p. 9-10.

314 Goldby 2013, p. 19.

that the agencies hold themselves as well as law enforcement information, in order to identify opportunities for action against organized crime.<sup>315</sup> Inland Revenue also has routine access to SARs.<sup>316</sup>

#### 4.4.2.3 Possibilities for local information exchange: partnership working

Varied forms of partnership – or multi-agency – approaches to tackling crime and disorder in England and Wales have been implemented since the 1960s.<sup>317</sup> Partnership approaches in England and Wales are built on the premise that no government agency is able to tackle a complex problem, such as crime and disorder, on its own; instead, agencies need to cooperate with other government agencies.<sup>318</sup> Berry et al. describe ‘partnership approach’ broadly as: “a co-operative relationship between two or more organizations to achieve a common goal.”<sup>319</sup>

The publication of the Morgan Report in 1991<sup>320</sup> led to the wide-scale voluntary adoption of one form of partnership working: the Community Safety Partnerships (CSPs) in England and Wales on the local level.<sup>321</sup> Currently, the partnerships differ per region,<sup>322</sup> and have different names, such as CSPs,<sup>323</sup> Crime and Disorder Partnerships (CDRPs)<sup>324</sup> and Gang Management Units.<sup>325</sup> Although the nature and operation of the local partnerships differ per area, they aim to apply the various instruments available to the participating agencies to tackle and disrupt crime.<sup>326</sup> We will use the abbreviation CSP in this report, referring to all types of partnerships, unless otherwise indicated.

The CSPs are local bodies specifically established for the purpose of organized crime reduction through data-sharing, cooperation and implementation of strategies by local agencies.<sup>327</sup> The main purpose of such partnerships is thus to tackle crime and anti-social behaviour more effectively,<sup>328</sup> resulting in a close connection between partnership working and crime prevention.<sup>329</sup> The introduction of the Crime and Disorder Act 1998 constituted

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315 Cabinet Office 2009, p. 47.

316 Levi & Maguire 2004, p. 414.

317 Van Staden, Leahy-Harland & Gottschalk 2011, p. 1; Berry et al. 2011, p. 2.

318 Berry et al. 2011, p. 1 and 2.

319 Berry et al. 2011, p. 1.

320 *Safer Communities: The local Delivery of Crime Prevention through the Partnership Approach*.

321 Berry et al. 2011, p. 2.

322 E.g. Cooper et al. 2009; Van Staden, Leahy-Harland & Gottschalk 2011, p. 2. This is also addressed in the current NCA Strategy, in which it is implied that this benefits the local situation. HM Government October 2013, p. 30.

323 HM Government October 2013, p. 30.

324 Harvie & Manzie 2011, p. 84; Cooper et al. 2009.

325 HM Government October 2013, p. 30.

326 HM Government October 2013, p. 29-31.

327 Steel, Ward & Diamond 2010, p. 1; Van Staden, Leahy-Harland & Gottschalk 2011, p. vi.

328 Harvie & Manzie 2011, p. 80.

329 Harvie & Manzie 2011, p. 80.



a key component of the UK's modernization policy,<sup>330</sup> and met the policy objective of gaining efficiency by combining resources and expertise and sharing good practices.<sup>331</sup>

Sections 5 to 7 of the Crime & Disorder Act 1998 give statutory significance to the CSPs.<sup>332</sup> In practice, this means that local authorities (or established local community groups therein) are obliged to collaborate with statutory agencies.<sup>333</sup> Although the Crime and Disorder Act 1998 gives statutory significance to partnership working in the local areas, there is no obligation for the local authorities to establish such bodies.<sup>334</sup> Thus, cooperation can also take place without an established partnership body.

Sections 5 and 6 (particularly paragraphs 4 and 5) require that local governments implement a crime and disorder strategy, including cooperation with other persons and bodies. Section 17 paragraph 1 of the Crime and Disorder Act 1998 requires the following of the police and local authority:

without prejudice to any other obligation imposed on it, it shall be the duty of each authority to which this section applies to exercise its various functions with due regard to...the need to do all that it reasonably can to prevent, crime and disorder in its area.

In the paper *Extending our Reach*, the Cabinet Office suggested tackling organized crime via local partnership working (more specifically a CSP), which involves the sharing of information between the partnering agencies.<sup>335</sup> CSPs consist (but not necessarily exclusively) of representatives from the police, the local council and the fire, health and probation departments<sup>336</sup> as well as youth justice.<sup>337</sup> Other authorities involved are rescue authorities and Departments for Work and Pension, Children's Services and Trading Standards.<sup>338</sup> The NCA indicates that immigration authorities and education authorities should become involved in the local partnerships.<sup>339</sup> The foregoing suggests that the local partnerships are meant to utilize not only administrative measures but also other types of measures, ranging

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330 Harvie & Manzie 2011, p. 80.

331 Harvie & Manzie 2011, p. 80.

332 Berry et al. 2011, p. 2; Van Staden, Leahy-Harland & Gottschalk 2011, p. 1; Harvie & Manzie 2011, p. 80.

333 Harvie & Manzie 2011, p. 80. See also: Burnett & Appleton 2004; Millie et al. 2005.

334 Harvie & Manzie 2011, p. 84.

335 Cabinet Office 2009, p. 46-49; Van Staden, Leahy-Harland & Gottschalk 2011, p. 1.

336 Van Staden, Leahy-Harland & Gottschalk 2011, p. vi; Cooper et al. 2009, p. 15-16; <https://www.gov.uk/government/policies/reducing-and-preventing-crime--2/supporting-pages/community-safety-partnerships>.

337 Harvie & Manzie 2011, p. 84.

338 Van Staden, Leahy-Harland & Gottschalk 2011, p. 5. A whole list of authorities involved in partnerships in 12 different areas in England & Wales can furthermore be found in Van Staden, Leahy-Harland & Gottschalk 2011, p. 17ff.

339 HM Government October 2013, p. 30.

from offender management to ASBOs.<sup>340</sup> Local partnership working has also been used to address problems with licensed businesses run by criminals, which makes it possible for local authorities to take administrative measures, such as planning matters, trade refuse agreements and other trading matters.<sup>341</sup> In the current NCA Strategy, local partnerships are seen as essential for the success of the strategy.<sup>342</sup> The authorities involved should be able to make full use of their powers in the context of the partnership.<sup>343</sup> The NCA Strategy stresses, however, that the main assigned authority for tackling crime remains the police.<sup>344</sup> Even so, the Strategy also proposes the instalment of new local 'organized crime partnership boards',<sup>345</sup> again in order to include local authorities and agencies so as to combine available information.<sup>346</sup>

Previous research indicates that the agreements on information sharing between the various authorities in local partnerships are personalized per partnership.<sup>347</sup> Multi Agency Risk Assessment Conferences (MARACs), Multi Agency Public Protection Arrangements (MAPPAs), Prolific and Priority Offender (PPO) schemes<sup>348</sup> and information-sharing protocols<sup>349</sup> are examples of such agreements. The types of information shared and to which sensitivity level are decided locally.<sup>350</sup> The information-sharing protocols are developed broadly in two distinct manners:<sup>351</sup> use of existing protocols, based on the Crime and Disorder Act, along with a memorandum of understanding,<sup>352</sup> and the setting up of new protocols, mostly when there are concerns that the existing protocols are insufficient.<sup>353</sup>

Types of information shared within the partnerships include personal information (name, address, vehicles, businesses, etc.) shared by police with the partners. This information can be cross-referenced with information from the different partners, including background information (education, previous convictions), general lifestyle information (housing, family and friends, general movements, vehicles, etc.), financial activity (benefits, business, financial transactions), recent criminal activity, previous and current enforcement and investigations.<sup>354</sup> Previous research by the Home Office into partnership working pilot projects suggests that the foremost obstacle to information sharing in the start-up phase

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340 Van Staden, Leahy-Harland & Gottschalk 2011, p. 3.

341 Cabinet Office 2009, p. 48-49.

342 HM Government October 2013, p. 30.

343 HM Government October 2013, p. 30.

344 HM Government October 2013, p. 10 and 30.

345 HM Government October 2013, p. 10.

346 HM Government October 2013, p. 10.

347 Van Staden, Leahy-Harland & Gottschalk 2011, p. 2.

348 Van Staden, Leahy-Harland & Gottschalk 2011, p. 2.

349 Van Staden, Leahy-Harland & Gottschalk 2011, p. 8.

350 Van Staden, Leahy-Harland & Gottschalk 2011, p. 8.

351 Van Staden, Leahy-Harland & Gottschalk 2011, p. 22.

352 Van Staden, Leahy-Harland & Gottschalk 2011, p. 22.

353 Van Staden, Leahy-Harland & Gottschalk 2011, p. 22.

354 Van Staden, Leahy-Harland & Gottschalk 2011, p. 23.

was variation in deciding whether to share information.<sup>355</sup> The decision whether or not to share information depended on individual organizations or individuals in those organizations, resulting in differences between and within partnerships.<sup>356</sup> Another hurdle was the realization that simply sharing information is not enough; a beneficial partnership depends on understanding which information is needed for what measure and by which partner.<sup>357</sup> In a more advanced stage of the pilots, other obstacles to partnership working were identified, i.e. sanitized information, lack of trust and understanding as to what information could and should be shared and how it would be used.<sup>358</sup>

The procedure for taking action against individuals consists of the following elements. Usually, the police share (initial) information on individuals – persons who have also been identified by the police as targets for the partnership – with the other partners, after which those partners share their information with the police authorities.<sup>359</sup> Thereafter, the combined information is analysed and the relevant tools of the separate partners are applied against the individual.<sup>360</sup> Afterwards, the enforcement is reviewed and possible new information updated in the relevant databases of the partners.<sup>361</sup> The police therefore continue to play a dominant role in the partnerships.<sup>362</sup>

Lastly, on a regional level, Regional Organized Crime Units (ROCU) are exchanging information with one another and with the Government Agencies Intelligence Network (GAIN) with the aim of working across local police boundaries. GAIN is made up of traditional law enforcement authorities and agencies such as the Trading Standard and the Environment Agency, which can invoke administrative measures.<sup>363</sup> Both the ROCUs and GAIN are to be expanded and collaborate closely with the NCA regional offices.<sup>364</sup> Since the NCA Strategy implies that regional collaboration between the ROCUs, NCA's regional offices and GAIN focuses predominantly on criminal procedure, these offices will not be explored in-depth here.

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355 Van Staden, Leahy-Harland & Gottschalk 2011, p. 24.

356 Van Staden, Leahy-Harland & Gottschalk 2011, p. 24.

357 Van Staden, Leahy-Harland & Gottschalk 2011, p. 24.

358 Van Staden, Leahy-Harland & Gottschalk 2011, p. 24.

359 Van Staden, Leahy-Harland & Gottschalk 2011, p. 9.

360 Van Staden, Leahy-Harland & Gottschalk 2011, p. 9.

361 Van Staden, Leahy-Harland & Gottschalk 2011, p. 9.

362 Van Staden, Leahy-Harland & Gottschalk 2011, p. 8-9.

363 HM Government October 2013, p. 29.

364 HM Government October 2013, p. 29.

#### 4.4.3 *Closing or expropriating housing*

In England & Wales, administrative or law enforcement authorities have various options available for closing licensed or other premises. We briefly discuss these powers below, focusing primarily on the scope of these instruments and the relevant competent authorities.

##### **The Licensing Act 2003**

The Licensing Act 2003 modernized and integrated several existing licences relevant for the alcohol and entertainment sector in England and Wales following the publication of a white paper in April 2000.<sup>365</sup> It moved the responsibility of the alcohol and entertainment licensing policy from the Home Office to the Department for Culture, Media and Sport.<sup>366</sup> The Act provides for ‘licensing activities’, such as the sale and supply of alcohol, designed to attain four fundamental objectives.<sup>367</sup> These four objectives include:

1. the prevention of crime and disorder;
2. public safety;
3. the prevention of public nuisance and;
4. the protection of children from harm.<sup>368</sup>

Four types of licences exist, namely the personal licence,<sup>369</sup> the premises licence,<sup>370</sup> the club premises certificates<sup>371</sup> and temporary event notices.<sup>372</sup> These licences are granted by the licensing authorities as specified in Section 3 of the Act, which in most cases will be the local authority<sup>373</sup> or, when personal licences are concerned, the authorities in the applicant’s place of residence.<sup>374</sup> These authorities can, for the purpose of attaining the premises and club premises licence objectives, review, suspend or revoke a licence, exclude activities or modify the operating conditions of a licence.<sup>375</sup>

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365 Explanatory Notes to the Licensing Act 2003, p. 1. via [www.legislation.gov.uk](http://www.legislation.gov.uk). Hereafter: Explanatory Notes Licensing Act. Simultaneously repealing and replacing several other Acts. See Explanatory Notes Licensing Act 2003, p. 3-4.

366 Explanatory Notes Licensing Act, p. 1.

367 Section 1 of the Licensing Act 2003; Explanatory Notes Licensing Act, p. 1.

368 Section 4 paragraph 2 of the Licensing Act 2003 and Explanatory Notes Licensing Act, p. 1-2 and 5-6.

369 Part 6 of the Licensing Act 2003.

370 Section 2 of the Licensing Act 2003 and Part 3 of the Licensing Act 2003.

371 Section 2 of the Licensing Act 2003 and Part 4 of the Licensing Act 2003.

372 Section 2 of the Licensing Act 2003 and Part 5 of the Licensing Act 2003.

373 Explanatory Notes Licensing Act, p. 2.

374 Explanatory Notes Licensing Act, p. 2.

375 Explanatory Notes Licensing Act, p. 3.

When an application is made to obtain or renew a personal licence, a ‘relevant unspent<sup>376</sup> or comparable foreign<sup>377</sup> conviction<sup>378</sup>’ is reason for the licensing authority to consult the police on those convictions.<sup>379</sup> Section 6 of the Licensing Act 2003 (Personal Licences) Regulations 2005 determines that an applicant must submit either a criminal conviction certificate in some form or a declaration of no convictions with his application. Examples of relevant offences are theft, robbery, financial crimes, drug crimes etc.<sup>380</sup> When the chief officer of police determines that the granting of the licence in combination with the relevant unspent or comparable foreign conviction would undermine the crime prevention objective of the Licensing Act, he is obliged to send the licensing authority an ‘objection notice’ within 14 days which must also include the reasons that have led to this conclusion.<sup>381</sup> If he fails to deliver the objection notice within that period, or subsequently withdraws it, the licensing authority must grant the application.<sup>382</sup> If an objection notice is given, the licensing authority must organize a hearing,<sup>383</sup> unless all the parties involved agree that this is unnecessary and withdraw the application if the licensing authority accepts that rejection is necessary for the purpose of crime prevention.<sup>384</sup> In any other case, the licence must be granted.<sup>385</sup> The applicant for the personal licence (or licence renewal), must inform the licensing authority of convictions during the application period. Failure to do so is considered an offence.<sup>386</sup> If such convictions should come to light after the licence has been granted, the licence may be revoked under the same conditions as described in Section 120.<sup>387</sup> When a personal licence holder is charged with a relevant offence as described in Schedule 4, he must notify the court of this licence.<sup>388</sup> The court is able to order forfeiture of the licence or suspend the licence for up to six months.<sup>389</sup> When the court convicts a personal licence holder, it is obliged to notify the relevant licensing authority of that conviction.<sup>390</sup>

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376 See Section 114 of the Licensing Act 2003.

377 This means outside England and Wales, see Section 113 and Explanatory Notes Licensing Act, p. 30-31.

378 For the exact meaning of relevant offence see Section 113 and Schedule 4 of the Licensing Act 2003.

379 Section 120, paragraph 2 under d and paragraph 4 of the Licensing Act 2003. See also Section 133, which determines that regulations prescribe the documents and information that should accompany an application. These are the Licensing Act 2003 (Personal Licences) Regulations 2005.

380 See Schedule 4 to the Licensing Act 2003.

381 Section 120, paragraph 5 of the Licensing Act 2003.

382 Section 120, paragraph 6 of the Licensing Act 2003.

383 As regulated by the Licensing Act 2003 (Hearings) Regulations 2005.

384 Section 120, paragraph 7 of the Licensing Act 2003.

385 Section 120, paragraph 7 of the Licensing Act 2003.

386 Section 123 of the Licensing Act 2003.

387 Section 124 of the Licensing Act 2003.

388 Section 128 of the Licensing Act 2003.

389 Section 129 of the Licensing Act 2003.

390 Section 131 of the Licensing Act 2003.

Premises licences allow the holder of that licence to perform licensed activities on the designated premises. For example, alcohol may be sold by individuals holding a personal licence.<sup>391</sup> Club premises certificates allow qualifying clubs, which usually undertake non-profit activities from private premises,<sup>392</sup> to use club premises for such activities, which are a subset of the licensable activities.<sup>393</sup> The regulation that any member or employee must be a holder of a personal licence does not apply to club certificate holders.<sup>394</sup> The Licensing Act 2003 (Premises Licences and Club Premises Certificates) Regulations 2005<sup>395</sup> regulates which documents should be filed along with an application for a premises licence or club premises certificate. These do not include information on the applicant's previous convictions.

Persons can ask to perform temporary activities at premises. So-called permitted temporary activities applications can be filed by persons holding a personal licence, as well as by persons who do not hold a personal licence. Such activities may concern an application to serve alcohol during a wedding at a venue that does not have a licence to sell alcohol.<sup>396</sup> No reference is made to information on the applicant's previous convictions.

In general, Section 179 provides that police officers and other authorized persons (as defined in Section 13) may enter premises to check whether the licensed activities are appropriately carried out. Section 180 provides that police officers may enter and search premises on suspicion of an offence committed or about to be committed under the Act. The power of entry and search is meant specifically for situations in which it is suspected that an offence in respect of controlled drugs has been or will be committed. In such cases, Section 97 allows constables to enter and search club premises. Premises may also be entered by a constable or authorized person before the granting of a licence or club certificate relating to those premises, or in the event of a review,<sup>397</sup> according to Sections 59 and 96 of the Licensing Act 2003.

Moreover, the police can apply to the area's magistrates' court to reactively or preventively close licensed premises or premises holding licences with a temporary event notice when disorderly behaviour and excessive noise occurs for a period of 24 hours.<sup>398</sup> It is possible to appeal to the Crown Court in such cases.<sup>399</sup> The police inform the local authority of a closure of licensed premises, and this obliges the authority to review the

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391 Explanatory Notes Licensing Act, p. 2.

392 Explanatory Notes Licensing Act, p. 19.

393 Explanatory Notes Licensing Act, p. 2.

394 Explanatory Notes Licensing Act, p. 19.

395 Last amended by the 2012 regulations, no. 955.

396 Explanatory Notes Licensing Act, p. 26.

397 In such cases, reasonable force may be used by the constable and/or authorized person. See Explanatory Notes Licensing Act, p. 18-19.

398 See the questionnaire 2013 in Annex I and Section 160ff of the Licensing Act 2003; Explanatory Notes Licensing Act, p. 3.

399 Section 166 of the Licensing Act 2003.

premises licence.<sup>400</sup> Possible outcomes of such a review are modifications of the licence, the exclusion of a licensable activity, the removal of the designated supervisor from the licence, the suspension of the licence for no longer than three months or the revocation of the licence.<sup>401</sup> Appeal against the decision is possible, and there is the option of continuing the closure during the appeal.<sup>402</sup> During appeals, premises must stay closed (even if the licence remains in force), but a magistrates' court may order re-opening during the appeal.<sup>403</sup>

### **Enforcement in the event of nuisance caused by tenants**

The Housing Act 1988 and the subsequent Housing Act 1996 as amended by the Anti-social Behaviour Act 2003 provides several options for landlords to regain possession of premises in cases of criminal or anti-social behaviour.

First, under Section 6A of the Housing Act 1988 in conjunction with Section 153a or 153b of the Housing Act 1996, a social landlord can apply to the county court for a demotion order for their tenants if they exhibit anti-social behaviour or use premises for unlawful purposes. The demotion order was introduced by Section 14 paragraph 4 of the Anti-Social Behaviour Act 2003. The demotion order terminates the assured tenancy from the date of the order and if the tenant remains in the 'dwelling-house',<sup>404</sup> the tenancy becomes a demoted tenancy.<sup>405</sup>

Second, Section 7 of the Housing Act 1988 allows courts to issue a possession order for the premises when the grounds set out in Schedule II of the Act apply. This possession order basically means that the assured tenancy ends and that the landlord takes possession of the premises.<sup>406</sup> Schedule II lists several grounds, including non-payment of rent. The discretionary power of the court to impose a possession order<sup>407</sup> on ground 14 is of particular importance in the context of this report.<sup>408</sup> This applies when:

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400 Section 167 paragraph 1 and 2 of the Licensing Act 2003.

401 Section 167 paragraph 6 of the Licensing Act 2003; see also Explanatory Notes Licensing Act, p. 41-42.

402 Section 168 in conjunction with 181 and Schedule 5 of the Licensing Act 2003; Explanatory Notes Licensing Act, p. 52.

403 Section 167 and 168 in conjunction with Schedule 5 of the Licensing Act 2003; Explanatory Notes Licensing Act, p. 52.

404 Section 45 paragraph 1 of the Housing Act 1988 provides a definition of a 'dwelling-house': 'a house or part of a house'.

405 Section 6A paragraph 3 of the Housing Act 1988. A demoted tenancy reduces the security of a tenant for 12 months, reducing the tenancy to the same position as introductory tenancies, which can be defined as a 'trial period'. Section 124 of the Housing Act 1996 and <https://www.gov.uk/council-housing/types-of-tenancy>. See for information on introductory tenancies: Hunter 2006, p. 138ff and p. 142.

406 Section 5.

407 Section 7 paragraph 4 of the Housing Act 1988.

408 This ground is also extended to secure tenancies in Section 144 of the Housing Act 1996 and assured tenancies in Section 148 of that same Act.

- [...] the tenant, a person residing or visiting in the dwelling-house,
- a. has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality or;
  - b. has been convicted of
    - i. using the dwelling-house or allowing it to be used for immoral or illegal purposes, or;
    - ii. an indictable offence committed in, or in the locality of, the dwelling house.

Ground 15 encompasses the possibility of issuing a possession order when there is evidence of violence or threats of violence against spouses.<sup>409</sup>

Apart from immediately effective possession orders, the court may also issue suspended possession orders to allow the tenant to improve the situation causing the nuisance. Courts can only grant a suspended possession order if there is good reason to do so, such as a mental illness.<sup>410</sup> Suspended possession orders are an alternative to demoted tenancies as discussed above.<sup>411</sup>

In the case of *Knowsley Housing Trust v. Prescott*,<sup>412</sup> a tenant who had been convicted and sentenced to eight years of imprisonment for conspiracy to supply cocaine and amphetamine also received a possession order (at first postponed, later immediate) based on ground 14 of Schedule II of the Housing Act 1988. The trial judge surmised that the tenant dealt drugs on an 'industrial scale', not from his own home, but from another house in the vicinity. Furthermore, the possession order also included the convicted person's wife. These two facts – among others – were disputed and the decision was appealed. Regarding the matter that the person's house was not the premises in which the actual offence was committed, the judge ruling on appeal considered:

[...]the criminal conduct need not have been carried on in the house in question. This appears from the language of ground 14 in Schedule 2 Housing Act 1988, which distinguishes between convictions of the tenant (or a person residing in or visiting the house) as a ground for possession in two types of instance. These are convictions for (i) using the dwelling house or allowing it to be used for immoral or illegal purposes, or, (ii) an indictable offence committed in, or in the locality of, the dwelling house. The second instance is the relevant one in the present case. ...[T]he potentiality of damage in this case is manifest. In

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409 See also Sections 145 and 149 of the Housing Act 1996.

410 Wright 2011, p. 38.

411 Wright 2011, p. 38.

412 [2009] EWHC 924 (QB).



those circumstances, in agreement with the Housing Trust, and in respectful disagreement with Judge MacMillan, it does not appear to me that the fact that Mr. Prescott was careful to keep his own house free from drug dealing reduces the seriousness of the offences in the context of the making of an immediate possession order where the drugs factory was maintained in the locality.<sup>413</sup>

With regard to the involvement of Mrs. Prescott, the judge contemplated:

Third, it is submitted that the judge made no findings about Mrs. Prescott's case as to her knowledge of her husband's activities. A significant part of the Housing Trust's case was that it was 'clear beyond peradventure that (i) she knew what was going on; and (ii) she benefited knowingly and willingly from the illegal activity'. The judge accepted the second point, but as appears from the passage from his reasons quoted above, discounted it as a relevant factor. He made no findings in respect of the first point. Mrs. Prescott's response is that he had the skeleton argument in which the Housing Trust made this point. That is certainly true, but the question of her knowledge about the drug dealing is relevant on the postponement issue, where the cases show that the court requires a clear assurance as to future conduct. The inference to be drawn from Mrs. Prescott's decision not to give oral evidence is that she did not consider that her denials in this respect would stand the scrutiny of cross examination. Nor is there any reason to suppose that they would have done so in circumstances in which her witness statements provide no explanation of how her family's lifestyle was supported if not from the proceeds of drug dealing. It was, in my view, a relevant matter which pointed towards the making of an immediate possession order, but which the judge does not appear to have taken account of.<sup>414</sup>

In summary, the above ruling implies that possession orders can be imposed even if the criminal conduct did not take place in the dwelling-house itself and be extended to persons living in the house who were not involved (at least directly) in the criminal activity.

Third, the Housing Act 1996<sup>415</sup> allows for injunctions. Local authorities can apply for an injunction order with a county judge or the High Court in cases of anti-social behaviour according to Section 152ff of the Housing Act 1996. An injunction prohibits a person from:

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413 [2009] EWHC 924 (QB), under 20-21.

414 [2009] EWHC 924 (QB), under 22.

415 As amended by the Anti-social Behaviour Act 2003.

- a. engaging in or threatening to engage in conduct causing or likely to cause a nuisance or annoyance to a person residing in, visiting or otherwise engaging in a lawful activity in residential premises to which this section applies or in the locality of such premises,
- b. using or threatening to use residential premises to which this section applies for immoral or illegal purposes, or
- c. entering residential premises to which this section applies or being found in the locality of any such premises.<sup>416</sup>

The same types of measure – possession orders and injunctions – apply for private landlords, but they cannot rely on the statutory provisions. Instead, breaches of standards of behaviour encompassed in the contract allow the private landlord to apply for a possession order or injunction.<sup>417</sup> Obviously, social landlords may also respond to breaches of standards of behaviour by applying for an injunction or possession order.<sup>418</sup>

Lastly, the Anti-social Behaviour Act 2003 permits police to ask the court for a closure order, after they have submitted a closure notice. Although closure orders are classified as a police power, not regarded as an official tool to combat organized crime<sup>419</sup> and not as a power that can be used by an administrative authority, we elaborate on them briefly because in practice they are also used to combat crime.<sup>420</sup> Furthermore, the application process does involve consulting the relevant local authorities.

Article 1 paragraph 1 of the Act permits the issuing of a ‘closure notice’ and subsequent ‘closure order’ in respect of premises if there are reasonable grounds to believe that the premises:

have been used in connection with the unlawful use, production or supply of a Class A controlled drug, and that the use of the premises is associated with the occurrence of disorder or serious nuisance to members of the public.<sup>421</sup>

Before the police can issue the notice, they must consult the relevant local authority.<sup>422</sup> The notice itself results in the temporary closure of the premises to all but the persons who own them and those who habitually live there.<sup>423</sup> Within a time-window of 48 hours after the police have issued the notice, a magistrates’ court must decide whether to issue a sub-

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416 Section 152 paragraph 1 of the Housing Act 1996.

417 Wright 2011, p. 20.

418 Wright 2011, p. 36.

419 Levi 2004, p. 832-834.

420 See Annex I.

421 Section 1 paragraph 1 of the Anti-social Behaviour Act 2003. See also Annex I.

422 Section 1 paragraph 2 of the Anti-social Behaviour Act 2003.

423 Explanatory Note to the Anti-social Behaviour Act 2003, p. 2. Via [www.legislation.gov.uk](http://www.legislation.gov.uk). Hereafter: Explanatory Note ASBA.

sequent closure order.<sup>424</sup> The test to which the court must adhere is the following. First, the court must be convinced that the premises have indeed been employed for using, supplying or producing a Class A prohibited drug. Second, the premises must be associated with serious nuisance or disorder, and third the court must be satisfied that the order will prevent future nuisance or disorder.<sup>425</sup> The court can decide to close the premises for up to three months to all persons.<sup>426</sup> It is not necessary for those persons to have been convicted of an offence related to the production, use or supply of a controlled drug.<sup>427</sup>

#### 4.4.4 *Tools for seizing assets outside the scope of criminal procedure*

According to Levi, financial agencies are seen as potential contributors to controlling the risk of organized crime.<sup>428</sup> However, the legislation in England & Wales does not include administrative tools. For reasons of completeness, we present a brief overview of the four<sup>429</sup> basic tools available.<sup>430</sup>

1. The first is the possibility of removing assets by means of ‘criminal confiscation’. This involves issuing a confiscation order to someone who has been convicted by a criminal court for a particular crime or ‘lifestyle’ crime, which means that any crime can be the basis for a confiscation.<sup>431</sup>
2. A civil court can recover the proceeds of crime in the context of a ‘civil recovery’ under the Proceeds of Crime Act 2002, Parts 5 and 6. No criminal conviction is necessary. The civil standard of proof<sup>432</sup> was introduced as a threshold for this purpose, for which a criminal conviction is not necessary.<sup>433</sup> Since this is considered a drastic means, only the NCA and the Serious Fraud Office (SFO) are authorized to use these powers in England & Wales.<sup>434</sup>
3. The NCA is also authorized to use tax powers to recover alleged proceeds of crime. This approach is used if the authorities lack the means to prove that certain assets are ill gained.<sup>435</sup> *Extending our Reach* mentions that the government intends to use tax investigations more often.<sup>436</sup> In its NCA Strategy, the HM Government mentions that

424 Section 2 paragraph 2 of the Anti-social Behaviour Act 2003.

425 Section 2 paragraph 3 of the Anti-social Behaviour Act 2003.

426 Section 2 paragraph 4 of the Anti-social Behaviour Act 2003.

427 Section 2 paragraph 8 of the Anti-social Behaviour Act 2003. Explanatory Note ASBA, p. 3.

428 Levi 2004, p. 832-834.

429 Sproat 2012, p. 149ff; Doubourg & Prichard 2007, p. 58.

430 10899/11 JAI 380 COSI 44 CRIMORG 77 ENFOPOL 179, p. 44.

431 Sproat 2012:149ff; Doubourg & Prichard 2007:58.

432 Levi 2004, p. 832-834; Bell 2003, p. 134ff.

433 [www.soca.gov.uk](http://www.soca.gov.uk).

434 Sproat 2012, p. 149ff.

435 Sproat 2012, p. 149ff.

436 Cabinet Office 2009:43ff.

the HMRC used tax interventions to tackle the finances of organized and other criminals.<sup>437</sup>

4. Last, police and other law enforcement agencies are authorized to seize cash. The seized cash is then secured for civil proceedings in a magistrates' court.<sup>438</sup>

The former SOCA mentions in its policy document that the use of these powers all entail going to court.<sup>439</sup> This means that the process is rather slow. Instead, the SOCA can also use other powers to frustrate criminals' finances. These are:

1. The Financial Reporting Orders (FROs).<sup>440</sup> These are orders applied for by the prosecutor under the Serious Organized Crime and Police Act 2005 Articles 76ff, following the conviction of certain offences by a court, such as offences under the Theft Act 1968 or a 'lifestyle offence' under *the Proceeds of Crime Act 2002*. According to Article 79, the person is then obliged to report on their financial activities for a period of up to twenty years. The orders can be applied in England & Wales (Article 76), Scotland (Article 77) and Northern Ireland (Article 78).
2. The Serious Crime Prevention Orders.<sup>441</sup> These orders entail civil proceedings under the Serious Crime Act 2007 applicable for England & Wales (Article 1) and Northern Ireland (Article 3). The prosecutors or the Director of the SFO can make applications to the High Court or the Crown Court for which a person has been convicted of serious crimes in England & Wales and Northern Ireland or elsewhere. The meaning of 'serious crime' has been specified in Schedule 1 of the Act and encompasses drug trafficking, human trafficking, arms trafficking and several financial crimes either fully completed or inchoate. According to Article 16, an order can last up to five years, with the possibility of issuing a subsequent order when the older one lapses. Article 2 in conjunction with 5 gives a non-exhaustive list of types of orders, entailing prohibitions, restrictions or requirements aimed at preventing, restricting or disrupting serious crime. Examples are restrictions, requirements or prohibitions on travelling,<sup>442</sup> on the usage of items (such as mobile phones),<sup>443</sup> on premises, associated persons or working arrangements.

As can be derived from the description, the SCPOs can also be used for frustrating other aspects of a person's life than just their finances.

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437 HM Government October 2013, p. 35.

438 Sproat 2012, p. 149ff.

439 <http://www.soca.gov.uk/about-soca/how-we-work/asset-recovery>.

440 <http://www.soca.gov.uk/about-soca/how-we-work/asset-recovery>.

441 <http://www.soca.gov.uk/about-soca/how-we-work/asset-recovery>.

442 [http://www.cps.gov.uk/legal/s\\_to\\_u/serious\\_crime\\_prevention\\_orders\\_\(scpo\)\\_guidance/](http://www.cps.gov.uk/legal/s_to_u/serious_crime_prevention_orders_(scpo)_guidance/).

443 10899/11 JAI 380 COSI 44 CRIMORG 77 ENFOPOL 179, p. 22 and 36.

4.4.5 *Other tools*

Based on the questionnaire we sent out in 2013,<sup>444</sup> other instruments can be identified which the administrative authorities may use to disrupt criminal activities. These measures relate to the misuse of drugs or prescription drugs and the licences that are required by companies to import or export such drugs or precursor chemicals.

Section 3 paragraph 2 – or under certain circumstances Section 7 paragraph 1 – of the Misuse of Drugs Act 1971 regulates that the prohibition on importing and exporting controlled drugs does not apply when the Secretary of State has issued a licence for such activities. The Misuse of Drugs Regulations 2001 introduces a licensing scheme. Schedules 1 to 5 of the Misuse of Drugs Regulations 2001 specify to which types of controlled drugs the Regulation applies. See also the responses to the 2013 questionnaire in Annex I.

Parallel to the licensing system for controlled drugs is a licensing and fee system for chemical precursors. These chemicals are frequently used to produce controlled drugs unlawfully.<sup>445</sup> The Controlled Drugs (Drug Precursors) Community External Trade Regulations 2008 and the Controlled Drugs (Drug Precursors) Intra-Community Trade Regulations 2008 enact provisions for the licensing of such chemicals. The UK intra-community Regulations implement Regulation 2004/273/EC and the UK external regulations implement Council Regulation 2005/111/EC.<sup>446</sup> Even though the EU Regulations have direct effect in the UK, the UK regulations are meant to support them in providing the powers and penalties as required by the EU Regulations.<sup>447</sup> Under the Regulations, the Secretary of State issues a licence that may not exceed three years.<sup>448</sup> For internal trade, special licences can also be issued to specific persons, such as pharmacists, veterinary surgeons, chief officers of police etc. in accordance with Article 3 paragraph 6 of the 2004 EU Regulation which allows for special licences for certain professionals, if the precursors are used in the context of their official activity. For external trade, a licence is issued in accordance with Article 6 of the 2005 EU Regulation. The Controlled Drugs (Drug Precursors) (Intra-Community Trade and Community External Trade) Regulations 2010 introduce fees for

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<sup>444</sup> See Annex I.

<sup>445</sup> See the Explanatory Memorandum to the Controlled Drugs (Drug Precursors) (Intra Community Trade and Community External Trade) Regulations 2010, p. 1. Via [www.legislation.gov.uk](http://www.legislation.gov.uk). Hereafter: Explanatory Memorandum 2010 Regulations.

<sup>446</sup> See the Explanatory Memorandum to the Controlled Drugs (Drug Precursors) Intra-Community Trade Regulations 2008 and the Controlled Drugs (Drug Precursors) Community External Trade Regulations 2008, p. 2. Via [www.legislation.gov.uk](http://www.legislation.gov.uk). Hereafter: Explanatory Memorandum to the 2008 Regulations.

<sup>447</sup> Explanatory Memorandum to the 2008 Regulations, p. 2.

<sup>448</sup> Section 4 of the Controlled Drugs (Drug Precursors) Community External Trade Regulations 2008 and Section 4 of the Controlled Drugs (Drug Precursors) Intra-Community Trade Regulations 2008.

licences, registrations and authorizations regarding precursor chemicals.<sup>449</sup> It is hoped that the introduction of licences will act as a deterrent in certain cases.<sup>450</sup>

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<sup>449</sup> Explanatory Memorandum 2010 Regulations, p. 1.

<sup>450</sup> See Annex I, the 2013 questionnaire.

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## ANNEX

*I. Questionnaire – responses based on the definition of ‘administrative approach’ as used in this research.*<sup>451</sup>

1. the preventive screening and monitoring of applicants (persons and legal entities) for permits, tenders and subsidies;  
 Drugs: We operate a risk-based licensing regime in respect of persons (individuals and/or companies) operating at specific premises in the UK (with the exception of Controlled Drugs in Northern Ireland- this power is delegated). For Controlled Drug licences (domestic and import/export) the regime exists with reference to the Misuse of Drugs Act (MDA) 1971 (which lists what is prohibited and provides for regulations to be made to enable) and the associated Misuse of Drugs Regulations 2001 (enabling) under which the system of domestic Controlled Drug licensing operates. Import/export authorizations are made solely with reference to the MDA 1971. None of this legislation sets out how the licensing regime is to be operated, in terms of processes, visits etc. That is a matter of policy. Focusing on domestic licensing, we assess applications on the basis of the individuals, their competence, any convictions/ cautions/ bankruptcy etc. We consider the companies activities, processes, physical security, environmental risk, supply chain, cognisance with process. We use soft intel (internet, satellite mapping, cross referencing information) and also seek Police ‘Intel’.
  - We require, referencing SI (Statutory Instrument) 1818/2009 all persons named to have an enhanced Disclosure and Barring Service (Criminal Record) check.
  - For Precursor Chemicals, pretty similar considerations are under EU Regulations (273/2004, 111/2005), enacted to domestic law by two SI.
  - Fees are levied for licences (acts as a deterrent in some cases) under the Misuse of Drugs (Fees) Regulations 2010.
2. the power to close or expropriate premises when public nuisance occurs in or around those premises;
  - The Licensing Act 2003 extended police powers to seek court orders to close licensed premises in an area experiencing or likely to experience disorder and to close down instantly licensed premises that are disorderly, likely to become disorderly, or are causing nuisance as a result of noise from the premises.
  - The Anti-social Behaviour Act 2003 introduced the power to close premises which are concerned in the production, consumption or supply of Class A drugs and which are causing disorder or serious nuisance to the public.

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<sup>451</sup> See Section 4.1.

- the possibility of seizing criminals' assets in the framework of administrative procedure, outside the scope of a criminal procedure;

**SECTION 2A OF THE PROCEEDS OF CRIME ACT 2002 CREATED 4 ASSET RECOVERY REGIMES:**

*Confiscation;*

Confiscation follows conviction for an offence. In making an order the court must decide whether the defendant has a 'criminal lifestyle', based on a number of legislative triggers, including specific types of offences. Where the offender fails to pay the confiscation order they may be subject to a sentence of imprisonment. This is not an alternative to paying the order

*Civil recovery;*

Civil recovery is a form of non-conviction-based asset forfeiture which allows for the recovery in civil proceedings before the High Court of property which is, or represents, property obtained through unlawful conduct. Importantly, the proceedings are against the property itself (in rem) rather than against an individual (in person). These proceedings are civil litigation and the civil standard of proof (the balance of probabilities) applies.

*Cash forfeiture;*

Cash forfeiture generally provides a simple and speedy non-conviction-based magistrates' court procedure for recovering seized criminal cash. Any party wishing to contest the forfeiture must demonstrate to the court that the cash comes from a legitimate source.

*Criminal taxation;*

Criminal taxation is also a non-conviction-based power, but it does not result in criminal property being recovered. Instead it allows tax to be charged on a person's income, profits or gains where there are reasonable grounds to suspect that they arise or accrue from criminal conduct on the part of that person or another.

(4) other regularly applied methods open to administrative authorities to tackle and prevent crime.

We have a new approach to fighting crime that involves a shift of power from Whitehall to local communities. The police will be given far greater freedom to do their jobs, and the public more power to hold them to account.

We will judge our success on whether crime has fallen.

We're reducing crime by:

- creating community triggers to deal with persistent antisocial behaviour
- using community safety partnerships, and police and crime commissioners, to work out local approaches to deal with issues, including antisocial behaviour, drug or alcohol misuse and re-offending
- establishing the national referral mechanism (NRM), to make it easier for all the different agencies that could be involved in a trafficking case to cooperate, share information about potential victims and get access to advice, accommodation and support
- setting up the National Crime Agency (NCA), which will be a new body of operational crime fighters
- creating street-level crime maps to give the public up-to-date, accurate information on what is happening on their streets so they can challenge the police on performance

And we're trying to prevent crime by:

- creating the child sex offender disclosure scheme, which allows anyone concerned about a child to find out if someone in their life has a record for child sexual offences
- legislating against hate crime
- using football banning orders to stop potential troublemakers from travelling to football matches – both at home and abroad
- legislating to prohibit cash payments to buy scrap metal and reforming the regulation of the scrap metal industry to stop unscrupulous dealers buying stolen metal

Latest relevant bills and legislation; Crime and Courts Act <http://services.parliament.uk/bills/2012-13/crimeandcourts.html>

Anti-Social Behaviour, Crime and Policing Bill <http://services.parliament.uk/bills/2013-14/antisocialbehaviourcrimeandpolicingbill.html>

## II. List of administrative authorities received from UK representative

Administrative Body	Business / Service
BIS – Department of Business, Innovations and Skills	The Insolvency Service, disqualification of Company Directors
Driver and Vehicle Licensing Agency (DVLA)	Driving licence registration, vehicle registration and vehicle excise duty
Department of Work and Pensions (DWP)	Employment records, benefits and allowances records including Disability benefit

<b>Administrative Body</b>	<b>Business / Service</b>
Environmental Agency	Regulation, licensing, permits in relation to pollution and waste related treatment and disposal matters; e.g. Car Washes
Environmental Health	Regulation, Licensing and compliance, e.g. Tanning Salons, Nail Bars, Restaurants and Cafes
Federation Against Copyright Theft (i.e. FACT)	Counterfeiting, copyright and trademark infringements
Financial Services Authority	Regulate most financial services markets, exchanges and firms
Fire and Rescue Service	Regulation of fire safety orders applicable to commercial property and places of assembly (i.e. churches)
Food Standards Agency	Regulate gambling in Great Britain as a co-regulator with local authorities.
Gangmasters Licencing Authority	Licensing and registration of Gangmasters operating in Agriculture, Horticulture and Shellfish industries
Health and Safety Executive	Protect the health, safety and welfare of people at work, and to safeguard others, mainly members of the public, who may be exposed to risks from the way work is carried out
Her Majesty's Revenue and Customs (HMRC)	Income Tax, Corporation Tax, VAT and Tax credits
Local Authorities (i.e. City Councils)	Registering and regulation of births, deaths and marriages; council tax and benefits
Medicines and Healthcare products Regulatory Agency (MHRA)	Regulates and licensing of medicines and medical devices to ensure they work and are acceptably safe, e.g. tackle illegal supply, counterfeiting, theft, diversion, etc.
National Fraud Authority	Build awareness of fraud, improve support victims; coordinate efforts of counter-fraud community
National Health Service	Maintain records and regulate to counter fraud and corruption
Registered Social Landlords / Housing Trusts	Powers to manage tenancy and tackle anti-social behaviour through e.g. ASBOs, CRASBOs, injunctions, demoted tenancies and evictions
Security Industry Authority	Regulate the private security industry; license operatives and manage the voluntary Approved Contractor Scheme
The Gambling Commission	Regulate and license those involved in Betting, Casinos, Gaming machines, etc.
Trading Standards Agency	Responsible for enforcing a wide range of laws designed to promote a fair, safe and honest trading environment for both consumers and the business community; e.g. ensure compliance

<b>Administrative Body</b>	<b>Business / Service</b>
	with Licensing Act and the Gambling Act and a number of other legislative areas; e.g. inspect Pubs, Clubs and Taxi companies
TV Licensing	Maintain a record of licensed and unlicensed addresses in the UK
Vehicle and Operator Services Agency (VOSA)	Provides a range of licensing, testing and enforcement services with the aim of improving the roadworthiness standards of vehicles ensuring the compliance of operators and drivers, e.g. Haulage Firms and Taxi Companies





## 5 THE ADMINISTRATIVE APPROACH IN FRANCE

*D. Van Daele*

### 5.1 INTRODUCTION

#### 5.1.1 *French administrative organisation*

The French Republic, which has elements of both a presidential and a parliamentary system, is often considered to be one of the most centralized European countries. Even though, since 2003<sup>1</sup>, Article 1 of the French Constitution stipulates that France shall be organised on a decentralised basis, the central State is currently still in charge of most public interests and public decisions.<sup>2</sup> At central level, the executive power is first and foremost entrusted to the directly elected President of the Republic (*Président de la République*), who presides over the Council of Ministers. The President has both personal powers, which he exercises in an autonomous way, and shared powers, which are characterised by the fact that they require the countersignature of the prime minister and, usually, the ministers involved in the preparation and implementation of the decision concerned. With regard to these shared powers, the role of the President is assumed preponderant. The government is regarded as the agency that implements the general policy defined by the President and defends it in Parliament. Hence, in practice, the scope for governmental policy-making is less significant than suggested by the Constitution.<sup>3</sup>

Article 34 of the Constitution exhaustively lists the areas in which Parliament is empowered to legislate via statutes (*lois*). The implementation of these statutes is the responsibility of the prime minister<sup>4</sup>, who has the power to issue decrees in all cases in which statutes either refer to executive decisions or require implementation without an explicit reference.<sup>5</sup> According to Article 37 of the Constitution, matters other than those that fall within the scope of statutory law are determined by regulation. This regulatory power is also exercised by the prime minister.<sup>6</sup> In practice, however, the Parliament quite frequently adopts statutory provisions outside the scope of Article 34 of the Constitution. Furthermore, parliamentary legislative powers are derived not only from Article 34 of the

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1 Chrétien & Chifflot 2012, p. 125-126.

2 Auby & Cluzel-Métayer 2012, p. 9.

3 Kortmann 2004, p. 249, 251, 254 and 257-259.

4 Article 21, first paragraph Constitution.

5 Kortmann 2004, p. 269-270.

6 Article 21, first paragraph Constitution.

Constitution, but also from other constitutional provisions and general legal principles. As a consequence, the scope of these legislative powers is rather uncertain and a clear limit has not yet been established.<sup>7</sup>

It is important to note that the regulatory power of the prime minister is subject to Article 13 of the Constitution. According to this provision, the President signs the ordinances and decrees deliberated upon by the Council of Ministers. In that regard, the French system is characterised as a '*bicéphalisme administratif*', meaning that regulatory power is divided between the President and the prime minister.<sup>8</sup> Thus, the President is actively involved in the exercise of rule-making power and can also hinder the passage of ordinances and decrees.<sup>9</sup> While ordinances, given their nature<sup>10</sup>, are always enacted by the Council of Ministers<sup>11</sup> – and thus require the consent of the President –, this is not the case for decrees. Although there are not that many legal provisions that require a deliberation in the Council of Ministers<sup>12</sup>, in practice, the most important decrees are discussed there and submitted to the President for approval.<sup>13</sup> Nonetheless, the majority of regulatory decrees are enacted by the prime minister.<sup>14</sup>

The traditional centralisation of the French state is reflected in the rather complicated organisation of the central administration consisting of ministries, central services, inspectorates, and other institutions.<sup>15</sup> However, the French administrative organisation is also based on the principles of decentralisation and deconcentration. In this respect, the *collectivités territoriales de la République* are entrusted with the exercise of certain administrative powers. These territorial communities of the Republic are legal persons of public law with constitutionally and legally defined territorial and substantive competence.<sup>16</sup> The most important territorial communities are the regions, departments and municipalities.<sup>17</sup> On the one hand, according to the principles of decentralisation and subsidiarity<sup>18</sup>, these communities can take decisions in all matters that can best be handled at their level.<sup>19</sup> In

7 Kortmann 2004, p. 269-270.

8 Chrétien & Chiffot 2012, p. 122.

9 Kortmann 2004, p. 255.

10 According to Article 38 of the Constitution, the Government can be authorised by Parliament to take measures by ordinance that are in principle a matter of statute. Such a delegation of legislative power is only permitted for a limited period of time.

11 Article 38, second paragraph Constitution. See also the Articles 47, 47-1 and 74-1 of the Constitution.

12 For some examples, see Frier & Petit 2013, p. 95.

13 Waline 2012, p. 71 and 74.

14 Maillard Desgrées Du Lou 2011, p. 254. It is worth noting that the President usually also signs regulatory decrees enacted by the prime minister. In that case, the presidential signature is merely symbolic (Chrétien & Chiffot 2012, p. 183).

15 Kortmann 2004, p. 262.

16 Truchet 2013, p. 92.

17 Furthermore, special-status communities and overseas territorial communities are also considered to be territorial communities. See Article 72, first paragraph Constitution.

18 Kortmann 2004, p. 292.

19 Article 72, second paragraph Constitution.

this context, Article 72, third paragraph, of the Constitution stipulates that the territorial communities are self-governing through elected councils and have the power to make regulations in their spheres of competence. In reality, however, their normative powers are rather limited.<sup>20</sup> On the other hand, the territorial communities are also entrusted with the exercise of deconcentrated powers.<sup>21</sup> To that end, there is a State representative in each territorial community. Representing each of the members of the government, this State representative is responsible for national interests, administrative supervision, and compliance with the law.<sup>22</sup>

The regions, which were created in 1982 and started functioning in 1986<sup>23</sup>, are the largest territorial units. Currently, there are 22 regions in mainland France – this number will be reduced in the near future to 13<sup>24</sup> – and 4 regions in the overseas territories. In their capacity as territorially decentralised authorities, the regions mainly deal with socio-economic matters. In this respect, the directly elected *conseil régional* promotes the economic, social, health, cultural and scientific development of the region and takes measures concerning territorial planning.<sup>25</sup> As indicated above, the regions are also units of deconcentrated national administration. In that context, the *préfet de région*, who is appointed by the government and whose powers are regulated in Decree n° 2004-374 of 29 April 2004, represents the government and manages the deconcentrated national services in the region.<sup>26</sup> It should be noted that the regional prefect is also appointed as prefect of the department in which the capital of the region is located.<sup>27</sup>

The territory of France has been divided into departments since the French revolution. Whereas the departments traditionally rendered the basic level of deconcentrated national services, the regions now perform this function. Similar to the regions, the 101 departments are both territorially decentralised and deconcentrated administrative entities.<sup>28</sup> The key figure is the *préfet de département*. As a representative of the government, he implements the national policy and exercises administrative supervision over the department, the municipalities, the local public authorities, and the interdepartmental public authorities that have their seat in the department. As we discuss in Section 5.4 of this report, the prefect of the department is also responsible for maintaining public order in his department.<sup>29</sup>

20 Hertzog 2012, p. 211.

21 Kortmann 2004, p. 292.

22 Article 72, sixth paragraph Constitution.

23 For a discussion of the historical background, see Waline 2012, p. 164-167.

24 See <http://www.interieur.gouv.fr/Actualites/L-actu-du-Ministere/L-Assemblee-nationale-adopte-une-carte-a-13-regions>.

25 Article L. 4221-1 Code général des collectivités territoriales (CGCT).

26 Kortmann 2004, p. 292.

27 Frier & Petit 2013, p. 385.

28 Waline 2012, p. 92 and 148-149.

29 See the Articles 9, 10 and 11 of Decree n° 2004-374 of 29 April 2004.

The 36.680 municipalities are the level of government closest to the people. They are ruled by a directly elected municipal council (*conseil municipal*)<sup>30</sup>, which elects the mayor (*maire*)<sup>31</sup>. Since the municipalities are mainly decentralized administrative units<sup>32</sup>, the mayor is first and foremost entrusted with municipal responsibilities and acts as the executive arm of the municipality. In that capacity, the mayor heads the local administration, prepares the meetings of the *conseil municipal* – over which he also presides<sup>33</sup> – and implements its decisions.<sup>34</sup> In addition to his local responsibilities, the mayor – under the authority of the prefect of the department – acts in a limited number of matters as an agent of the State.<sup>35</sup> For example, the mayor is responsible for the civil registration and issuing of certain building permits.<sup>36</sup> As we discuss further in Section 5.4 of this report, this dual capacity is also reflected in police matters. On the one hand, the mayor, as the highest-ranking officer in the municipal government, is in charge of the municipal police.<sup>37</sup> As an agent of the state on the other hand, the mayor is entrusted with various administrative functions, which he carries out under the authority of the prefect of the department.<sup>38</sup>

Although the municipalities have a number of important powers with regard to, *inter alia*, economic and social matters<sup>39</sup>, it should be noted that many of them are too small<sup>40</sup> to operate efficiently.<sup>41</sup> Indeed, the most characteristic feature of the French municipal system is its fragmentation<sup>42</sup>, which is why various mechanisms for cooperation between municipalities have been developed.<sup>43</sup> First, municipalities – and especially those in rural and semi-urban areas – can join forces as a *communauté des communes*. This allows them to develop and implement joint initiatives with regard to, *inter alia*, economic development and spatial planning.<sup>44</sup> Second, there are cooperative structures that have been specifically developed for the most important municipalities. In urban agglomerations, consisting of a central city of at least 15.000 inhabitants and its peripheral municipalities, the joint management of for instance urban development and spatial planning projects can be

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30 See Waline 2012, p. 127-141.

31 Article L. 2122-4 CGCT.

32 Waline 2012, p. 97.

33 Article L. 2121-14 CGCT.

34 See Article L. 2122-21 CGCT.

35 For a general overview, see Cassia 2004, p. 245-259.

36 Waline 2012, p. 97.

37 Article L. 2212-1 CGCT.

38 Maillard Desgrées Du Loû 2011, p. 415.

39 According to Article L. 2121-29 CGCT, the *conseil municipal* regulates all matters of the municipality.

40 For specific details, see Waline 2012, p. 123.

41 Auby & Cluzel-Métayer 2012, p. 10.

42 Hertzog 2012, p. 207.

43 For a discussion on the cooperation between municipalities, see Frier & Petit 2013, p. 193-199; Hertzog 2012, p. 216-219; Lombard, Dumont & Sirinelli 2013, p. 172-177; Waline 2012, p. 229-238.

44 See Article L. 5214-1 *et seq.* CGCT.

entrusted to a *communauté d'agglomération*.<sup>45</sup> On a larger scale, a common policy and approach can be developed within the context of Urban Communities (*communautés urbaines*), regrouping several municipalities. The regrouped municipalities should consist of more than 250.000 inhabitants. The regulatory powers of the Urban Communities include, among others, those relating to economic, social, and cultural development.<sup>46</sup>

Finally, it should be noted that Paris is a municipality as well as a department, meaning that the council and the mayor have authority in both legal capacities. Moreover, internal security and police matters are dealt with by the prefect of police, who is formally placed under the authority of the Minister of the Interior<sup>47</sup>, but who in practice has a considerable degree of autonomy (*infra*, Section 5.4.3).<sup>48</sup>

### 5.1.2 *The administrative approach to combating organised crime in the context of organised crime policy in France*

Organised crime and the responses to it became a focal point of French criminal policy at the beginning of the 1990s.<sup>49</sup> Remarkably, this did not result in an official legal definition of organised crime. Instead, French criminal law uses a variety of concepts referring to collective behaviour aimed at committing serious offences with the help of an organised structure.<sup>50</sup> The most important provisions in this respect are Article 450-1 of the Criminal Code, dealing with the offence of criminal conspiracy (*association de malfaiteurs*), i.e. the conspiracy aimed at preparing a criminal offence, and Article 132-71 of the Criminal Code, which defines an organised gang (*bande organisée*) as any group formed or any agreement established with a view to the preparation, characterised by one or more material facts, of one or more criminal offences. The fact that an offence is committed by an organised gang is considered an aggravating circumstance leading to more severe punishment.<sup>51</sup>

Title XXV of Book IV of the French Code of Criminal Procedure contains specific provisions relating to the procedure applicable to the investigation, prosecution and trial of organised crime and delinquency, which is outlined bases on an extensive list of serious crimes. This Title governs not only investigative powers, such as surveillance, infiltration, the interception of telecommunications and the freezing of property, but also the jurisdiction of specialised courts.<sup>52</sup> It should be noted that specialised units were also set up within

45 See Article 5216-1 *et seq.* CGCT.

46 See Article 5215-1 *et seq.* CGCT.

47 Hertzog 2012, p. 214.

48 Mouhanna 2010, p. 30 and 33.

49 Godefroy 2004, p. 764.

50 Hagedorn & Bigo 2002, p. 209.

51 See Lemoine 2012, p. 25-34; Rassat 2011, p. 63-65 and 991-1002.

52 See De Monjour 2012, p. 138-155; Gentil 2012, p. 183-198.

the public prosecution service<sup>53</sup>, the national police<sup>54</sup> and the *Gendarmerie Nationale*<sup>55</sup>. Furthermore, a number of other government agencies are involved in the fight against organised crime. These include the Customs and Excise administration and TRACFIN<sup>56</sup>, a financial intelligence unit set up within the Ministries of Economics and Finance.<sup>57</sup> In this respect, reference must also be made to the ability of the public prosecutor, and even the obligation of the judicial authorities, to provide the tax authorities with any relevant information concerning tax fraud. This information can be used for further fiscal investigations, even if the documents transmitted are subsequently be declared inadmissible by a criminal court.<sup>58</sup>

This multi-agency approach aside, France currently has neither a specific set of tools nor an institutional framework to facilitate an administrative approach to combating organised crime. However, administrative authorities can, to some extent, play a role in preventing and combating crime in general and organised crime in particular. In this report, we examine four separate methods that could, if implemented, be applied in a French administrative approach to crime. First, France has a long-standing tradition of administrative sanctions. These sanctions can be defined as non-criminal sanctions of a punitive nature that can be imposed by administrative authorities. In Section 5.2.3.2, we discuss the scope of these administrative sanctions and the conditions under which they can be applied.

Second, the repeal of an administrative act can be a useful instrument in the context of an administrative approach to combat (organised) crime. As we will see, a distinction must be made between the revocation and the withdrawal of individual administrative acts. In addition, different rules apply depending on whether or not the administrative act creates rights (*infra*, Section 5.2.4).

Third, French law provides a number of mechanisms allowing administrative authorities to screen and monitor persons and legal entities. Although these mechanisms were not created to fight organised crime, they could be used in this context. In Section 5.3 of this report we demonstrate this by analysing the legal requirements for running a pub or restaurant and for casino licences. We also discuss the regulation of prostitution and the relevant aspects of public procurement law.

Finally, the prefect of the department and the mayor are entrusted with the task of preventing and averting dangers to public order and security. In Section 5.4 we examine

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53 See Chausserie-Laprée 2012, p. 167-183.

54 See Godefroy 2004, p. 777-780; Hagedorn & Bigo 2002, p. 222-228.

55 See Galtier 2012, p. 117-138.

56 TRACFIN is an abbreviation of “*Traitement du renseignement et action contre les circuits financiers clandestins*”.

57 Godefroy 2004, p. 781-782.

58 Bienvenu & T. Lambert 2010, p. 127.

whether and to what extent instruments directed at preventing the disturbance of public order could be used to prevent and combat (organised) crime problems.

## 5.2 ESSENTIAL CHARACTERISTICS OF FRENCH ADMINISTRATIVE PROCEDURE

### 5.2.1 *Types of administrative decisions*

As an essential feature of administrative law, administrative authorities are authorised to take unilateral decisions imposing obligations upon citizens. This authorisation is based on statutes and regulations that define the scope of administrative decisions issued by various administrative authorities.<sup>59</sup> A distinction must be made between regulatory, individual, and specific administrative decisions.

A regulatory decision (*décision réglementaire*) has no precise addressee and contains legal norms that apply to all persons who find themselves in the situation referred to in the decision. It does not confer rights to individuals *vis-à-vis* the administration. In contrast, an individual administrative decision has only one addressee (*décision individuelle*), while a specific administrative decision is addressed to a particular group of persons (*décision particulière*). Although individual or particular administrative decisions usually confer rights to individuals – e.g. the issuing of a permit –, this will not always be the case. For example, declaratory decisions or decisions conferring recognition do not confer rights.<sup>60</sup> In that case rights are conferred by statute or regulation and the administrative decision only ‘translates’ them into practice.<sup>61</sup> Furthermore, conditional administrative decisions<sup>62</sup> or administrative decisions obtained by giving false information or by any other form of deception or contrivance do not create rights.<sup>63</sup>

### 5.2.2 *Due process in administrative proceedings*

#### 5.2.2.1 **General principles**

Traditionally, French law strongly emphasises administrative effectiveness and the protection of the prerogatives and discretionary powers of administrative authorities.<sup>64</sup> This partly explains why France, unlike some other member states of the European Union, does not have comprehensive legislation on administrative proceedings. As a result, citizens’

<sup>59</sup> Auby & Cluzel-Métayer 2012, p. 11.

<sup>60</sup> Auby & Cluzel-Métayer 2012, p. 13-14; Truchet 2013, p. 239-240 and 242-243.

<sup>61</sup> Schwarze 2006, p. 877.

<sup>62</sup> Schwarze 2006, p. 877.

<sup>63</sup> Auby & Cluzel-Métayer 2012, p. 13.

<sup>64</sup> Schwarze 2000, p. 164 and 174.

rights in non-contentious administrative proceedings are based on general principles of law and some specific laws.<sup>65</sup>

In this context, the obligation to respect the rights of the defence is considered a general principle of law. According to the Constitutional Council, this principle has constitutional status.<sup>66</sup> With regard to the legislation, particular reference should be made to Act n° 78-753 of 17 July 1978 laying down various measures to improve relations between the administration and the public<sup>67</sup>, Act n° 79-587 of 11 July 1979 concerning the obligation to state grounds for administrative acts<sup>68</sup> and Act n° 2000-321 of 12 April 2000 concerning the rights of citizens in their relations with public administrations<sup>69</sup>.

#### 5.2.2.2 Hearing of participants

The *audi alteram partem* rule is a recognised general principle of French (administrative) law. This means that administrative authorities cannot take an unfavourable decision prior to giving the person concerned the opportunity to effectively make his position known.<sup>70</sup> This implies that the administration has to inform the person concerned about the intended decision and must give him the opportunity to consult the file.<sup>71</sup> In this manner, the person concerned can state his arguments relating to the facts and the proposed measure and so can try to prevent the making of a decision that would disadvantage him. Additionally, hearing participants in administrative proceedings is in the best interests of the administration. The *audi alteram partem* rule ensures that the case is adequately examined and that all of the relevant information is assessed.

Whereas the *audi alteram partem* principle was based on the case law of the Council of State for decades<sup>72</sup>, it is currently regulated by Article 24 of Act n° 2000-321 of 12 April 2000. As a general rule<sup>73</sup>, individual decisions that must be substantiated under Articles 1 and 2 of Act n° 79-587 of 11 July 1979 (*infra*, Section 5.2.2.4) can only be taken after the person concerned has been afforded the opportunity to submit his opinion in writing and, when appropriate and upon request, orally. The person concerned has the right to be assisted by a lawyer or to be represented by a proxy of his choice.

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65 Waline 2012, p. 423.

66 Frier & Petit 2013, p. 351.

67 Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal.

68 Loi n° 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public.

69 Loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations.

70 Frier & Petit 2013, p. 423.

71 Frier & Petit 2013, p. 352; Truchet 2013, p. 245.

72 Waline 2012, p. 423.

73 There are a number of specific procedures dealing with the hearing of participants. Article 24 of Act n° 2000-321 of 12 April 2000 does not apply to these procedures.



It should be noted that Article 24 of Act n° 2000-321 of 12 April 2000 does not apply to an administrative decision on an application submitted by the person concerned. In such cases, however, the applicant submits a file which allows him to communicate all relevant information.<sup>74</sup> Furthermore, the right to be heard is not an absolute right. First, this right does not apply in cases of emergency or under exceptional circumstances. Second, the person concerned will not be afforded the opportunity to express his opinion if doing so would be likely to prejudice public order or the conduct of international relations. Finally, an administrative authority is not obliged to respond to requests that are abusive, taking into account their number and their repetitive or systematic nature.<sup>75</sup>

### 5.2.2.3 Access to the file

As indicated above, the right of access to the file forms part of the rights of the defence in administrative proceedings. Additionally, administrative authorities<sup>76</sup> are obliged to disclose official documents upon request. No justification is needed for such a request.<sup>77</sup> This right of disclosure only applies to finalised documents, not to preparatory documents. Moreover, the right can no longer be exercised once the documents are made public.<sup>78</sup>

Again, the administration is not obliged to respond to requests that are abusive, taking into account their number and their repetitive or systematic nature.<sup>79</sup> Furthermore, Article 6 of Act n° 78-753 of 17 July 1978 contains important restrictions on the right of disclosure. For example, documents will not be communicated or made accessible if this would prejudice secrecy necessitated by national defence, French foreign policy, state security, public safety or the safety of persons.

### 5.2.2.4 Duty to state grounds

As a general rule, every administrative decision must be based on solid, adequately demonstrable factual and legal grounds that provide a legal foundation for the decision in question. Nevertheless, this general principle of administrative law is limited to the content of an administrative decision and does not imply the obligation to inform the person concerned of the grounds considered. A distinction is thus made between the grounds for a decision and the disclosure of those grounds.<sup>80</sup> In that respect, it is remarkable that French

74 Frier & Petit 2013, p. 351; Truchet 2013, p. 154.

75 Article 24, second paragraph Act n° 2000-321 of 12 April 2000.

76 See Article 1 Act n° 78-753 of 17 July 1978.

77 Truchet 2013, p. 153.

78 Article 2 Act n° 78-753 of 17 July 1978.

79 Article 2, last paragraph Act n° 78-753 of 17 July 1978.

80 Chrétien & Chiffot 2012, p. 515-516; Frier & Petit 2013, p. 354; Truchet 2013, p. 160 and 250; Waline 2012, p. 428.

administrative authorities have traditionally regarded the duty to state grounds as a threat to the effective execution of the law.<sup>81</sup>

Although theoretically there is still no general obligation to inform the person concerned of the grounds underlying an administrative decision<sup>82</sup>, the aforementioned Act of 11 July 1979 requires the administration to inform the applicant in writing of the legal and factual considerations underpinning the administrative decisions dealt with in articles 1 and 2.<sup>83</sup> First, grounds must be stated for all individual administrative decisions that deviate from the general rules laid down by law or regulation.<sup>84</sup> Second, natural and legal persons have the right to be informed of the grounds underlying certain adverse administrative decisions. These decisions are listed exhaustively in Article 1 of the Act of 11 July 1979. In the context of this report it is particularly important to note that grounds must be stated for decisions restricting civil liberties, constituting a police measure or imposing a sanction. This also applies to permit refusals and to decisions that impose restrictions or constraints on the granting of a permit. Furthermore, there must be justification for the withdrawal or revocation of an individual administrative decision creating rights.

Non-compliance with the duty to state grounds will result in the invalidity of the administrative act concerned.<sup>85</sup> Nevertheless, the duty to state grounds is not without exceptions. The grounds for a permit refusal need not be stated in cases in which disclosure of the grounds could undermine one of the secrets or interests protected by Article 6, second to fifth paragraphs, of Act nr. 78-753 of 17 July 1978 (*supra*, Section 5.2.2.3).<sup>86</sup> Moreover, the administration can refrain from giving reasons in the rare<sup>87</sup> cases of extreme urgency, although in such cases the grounds underlying the decision must still be communicated when so requested by the person concerned.<sup>88</sup>

### 5.2.3 *The execution of administrative decisions*

#### 5.2.3.1 **General principles**

A unilateral administrative act decided upon by a competent administrative authority and creating rights or obligations for citizens, is an enforceable legal decision. This implies that the administrative act, from its entry into force, assumes legal effects and must be complied

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81 Schwarze 2000, p. 170.

82 Lombard, Dumont & Sirinelli 2013, p. 245; Waline 2012, p. 428-429.

83 Article 3 Act n° 79-587 of 11 July 1979.

84 Article 2 Act n° 79-587 of 11 July 1979.

85 Truchet 2013, p. 250.

86 Article 1 Act n° 79-587 of 11 July 1979.

87 Frier & Petit 2013, p. 356.

88 Article 4 Act n° 79-587 of 11 July 1979.

with by all persons falling within its scope.<sup>89</sup> In case of non-compliance, however, the administrative authority is generally not empowered to enforce its decision without prior judicial authorisation. Only in cases where the law explicitly allows it, in cases of urgency, or in cases where no other legal remedy exists is the immediate forced execution by the administrative authority permitted.<sup>90</sup> Article R. 610-5 of the Criminal Code is of particular relevance in this respect. According to this provision, infringements of police decrees and orders are punishable by a fine. In addition, a number of other legal provisions, e.g. the Consumer Protection Act and the Highway Code, criminalise infringements of certain administrative decisions.<sup>91</sup>

In the context of this report, it is particularly important to keep in mind that France has an extensive history of imposing administrative sanctions. Below, we discuss the most essential aspects of these sanctions.

### 5.2.3.2 Administrative sanctions<sup>92</sup>

#### 5.2.3.2.1 Concept and scope

Some twenty years ago, the Council of State conducted a study of the administration's power to impose sanctions. This resulted in a list of approximately 500 types of infringements punishable by administrative sanctions. Given this, it is no exaggeration to say that the administration is to a large extent entrusted with the enforcement of complex legislation in such areas of law as employment, health, social security, tax, market regulation, and the environment. This high degree of involvement of governmental agencies in the sanctioning of unlawful forms of conduct is consistent with the French tradition of having a powerful, centralised administration. Nevertheless, the key reason for the massive expansion of administrative sanctions seems to be that the criminal justice system is unable to deal adequately with extensive, complex and frequently changing administrative regulations.<sup>93</sup>

In the light of the case law of both the Constitutional Council and the Council of State, administrative sanctions can be defined as non-criminal sanctions of a punitive nature (*sanction ayant le caractère d'une punition*) which an administrative authority imposes for a breach of a legal obligation. Thus, an administrative sanction is an *ex post* and repressive response to unlawful conduct, whereas administrative police measures (see Section 5.4.4) focus on the prevention of infringements.<sup>94</sup>

89 Chrétien & Chiffot 2012, p. 532-533; Lombard, Dumont & Sirinelli 2013, p. 247-248; Truchet 2013, p. 260-262.

90 See Chrétien & Chiffot 2012, p. 539-540; Lombard, Dumont & Sirinelli 2013, p. 248-249; Frier & Petit 2013, p. 377-379; Truchet 2013, p. 262-263.

91 Auby & Cluzel-Métayer 2012, p. 15.

92 For a detailed analysis, see Degoffe 2000; Dellis 1997; Moderne 1993.

93 Breen 2013, p. 195 and 204. See also Crucis & Breen, nrs. 3 and 16-18; Frier & Petit 2013, p. 376.

94 Breen 2013, p. 196-197; Frier & Petit 2013, p. 303-304.

There are different types of administrative sanctions, the most common of which are: a warning or injunction; a suspension or even revocation of an authorisation; and an administrative fine.<sup>95</sup> A crucial restriction put forward by the Constitutional Council, however, is that deprivation of liberty cannot be imposed as an administration sanction.<sup>96</sup> This is based on Article 66 of the Constitution, which states that judicial authorities are the guardians of the freedom of the individual.<sup>97</sup>

#### 5.2.3.2.2 *Revocation of an authorisation as an administrative sanction*

The aforementioned distinction between administrative sanctions and administrative police measures is not always clear-cut and must be assessed in the light of the circumstances of the case.<sup>98</sup> This can be illustrated by the revocation of an authorisation. As we will see, the legal qualification of this administrative decision depends on the predominant motive of the administrative authority.

First, an authorisation can be revoked if its holder ceases to meet a necessary condition for obtaining it. These conditions may relate, for example, to nationality, physical ability, or a financial guarantee. In such cases, the competent administrative authority is always entitled to revoke an authorisation. However, revocation of an authorisation in this case cannot be qualified as an administrative sanction. Second, under certain conditions, the revocation of an authorisation can be used as an instrument to maintain public order. This is discussed in Section 5.4 of this report. Finally, administrative authorities can revoke an authorisation as a means of punishing the authorisation holder for committing an infringement. In such cases, the revocation is considered to be an administrative sanction.<sup>99</sup> According to the Council of State case law, such a sanction may only be imposed when a legal instrument empowers administrative authorities to impose sanctions. This legal instrument does not have to be a formal law (*une loi*). Taking into account Articles 34 and 37 of the Constitution, regulations can indeed also empower administrative authorities to impose administrative sanctions.<sup>100</sup>

#### 5.2.3.2.3 *Substantive and procedural guarantees*<sup>101</sup>

In its landmark decision of 28 July 1989, the Constitutional Council ruled that neither the principle of the separation of powers nor any other principle or rule of constitutional status precludes an administrative authority, acting within the limits of its powers, from imposing sanctions. However, two restrictions apply. First, as stated, any deprivation of liberty is

95 Frier & Petit 2013, p. 377.

96 Frier & Petit 2013, p. 377.

97 Teitgen-Colly 2013, p. 4.

98 See Crucis & Breen, nrs. 33-34 and 33-38; Degoffe 2013, p. 2-3; Petit 2013, p. 1-6.

99 Breen 2013, p. 205-206. See also Crucis & Breen, nrs. 45-46; Tchen, nr. 108.

100 Crucis & Breen, nr. 58; Waline 2012, p. 438. See also Breen 2013, p. 210; Frier & Petit 2013, 377.

101 For a thorough analysis, see Crucis & Breen, nrs. 55-123.

excluded (*supra*, Section 5.2.3.2.1). Second, specific statutory measures are required to ensure respect for constitutionally guaranteed rights and freedoms.<sup>102</sup> Some months earlier, the Constitutional Council had already determined that the principle of legality of offences<sup>103</sup> and punishments, the principle of necessity of punishments, the principle of non-retroactivity of more severe criminal laws, and the rights of the defence apply to all penalties intended to serve as punishments, even when Parliament has conferred the power to inflict such penalties upon a body other than a court of law.<sup>104</sup> Furthermore, in 2012, the Constitutional Council ruled that the principles of independence and impartiality, as reflected in Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, must also be respected.<sup>105</sup>

As a constitutional court, the Constitutional Council assesses the constitutionality of legislation and performs both *ex ante*<sup>106</sup> and *ex post*<sup>107</sup> reviews. Although the Constitutional Council is not a supreme court that is hierarchically superior to the Council of State or the Court of Cassation, its decisions are binding on public authorities and all administrative and judicial bodies. Nevertheless, the case law of the Council of State on procedural guarantees in relation to administrative sanctions is of particular importance. In practice, the Constitutional Council often tends to follow, albeit implicitly, the viewpoint of the Council of State in this area.<sup>108</sup>

Although the substantive and procedural requirements outlined by the Constitutional Council are also imposed by the Council of State, it is remarkable that the Council of State largely takes into account the diversity of contexts in which administrative sanctions can be imposed. As a consequence, the level of substantive and procedural guarantees may, to a certain extent, vary depending on the context.<sup>109</sup> Nevertheless, the European Convention on Human Rights (ECHR) has a harmonising effect. While the Council of State initially ruled that administrative sanctions did not raise an issue under Article 6, § 1 ECHR, this

102 Conseil constitutionnel, Decision n° 89-260 DC of 28 July 1989, cons. nr. 6.

103 The Constitutional Council nevertheless accepts that administrative offences are defined by reference to the legal obligations of the holder of an administrative authorisation (Conseil constitutionnel, Decision n° 88-248 DC of 17 January 1989, cons. nr. 37).

104 Conseil constitutionnel, Decision n° 88-248 DC of 17 January 1989, cons. nr. 35-36. See also Conseil constitutionnel, Decision n° 93-325 of 13 August 1993, cons. nr. 47-48; Conseil constitutionnel, Decision n° 2006-535 DC of 30 March 2006, cons. nr. 36; Conseil constitutionnel, Decision n° 2009-580 DC of 10 June 2009, cons. nr. 14; Teitgen-Colly 2013, p. 5-6.

105 Conseil constitutionnel, Decision n° 2012-280 QPC of 12 October 2012, cons. nr. 16. See also Teitgen-Colly 2013, p. 6.

106 According to Article 61 of the Constitution, organic laws (*lois organiques*) must be submitted to the Constitutional Council before their promulgation. Acts of Parliament may, before their promulgation, be submitted to the Constitutional Council.

107 If, during proceedings in progress before a court of law, a claim is made that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the Council of State or the Court of Cassation may refer the case to the Constitutional Council (Article 61-1 Constitution).

108 Breen 2013, p. 201.

109 Breen 2013, p. 208.

opinion changed in the second half of the nineties. Taking into account the case law of the European Court of Human rights, the Council of State currently holds the imposition of various punitive administrative sanctions to be a criminal charge in the sense of Article 6 ECHR.<sup>110</sup> This implies not only that the right to a fair trial in principle<sup>111</sup> applies to administrative sanction proceedings, but also that the person concerned can appeal a decision imposing an administrative sanction to an administrative judge. Since it is a full remedial action (*un recours de plein contentieux objectif*), the judge will assess the case both on the facts and the merits.<sup>112</sup>

#### 5.2.4 *Repeal of administrative acts*

##### 5.2.4.1 **Two types of repeal**

Unless an administrative act is subject to a time limit, it will remain in force for an indefinite period of time. In other words, an administrative act will continue to apply unless it is annulled by the courts or repealed by the administrative authority that issued it.<sup>113</sup> With regard to the latter, French administrative law makes a distinction between the revocation (*abrogation*) and the withdrawal (*retrait*) of an administrative act. Both types of repeal can be useful for an administrative approach to combating (organised) crime.

Subject to certain conditions, an administrative authority can revoke an individual administrative act. Such a revocation has only prospective effect and not retroactive effect on the legal consequences that have already resulted from the administrative act. In contrast, the withdrawal of an administrative act does have retroactive effect and is, in that sense, similar to the annulment of an act by a court.<sup>114</sup> The conditions under which revocation and withdrawal are permitted are mainly laid down in Council of State case law. As we will see, different rules apply depending on whether or not an individual administrative decision creates rights.

##### 5.2.4.2 **Revocation of individual administrative acts**

###### 5.2.4.2.1 *Individual administrative decisions creating rights*

In light of the principle of legal certainty and the principle of protection of legitimate expectations, lawful administrative decisions conferring rights on individuals are to be

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110 Chrétien & Chiffot 2012, p. 376; Lombard, Dumont & Sirinelli 2013, p. 243. For a detailed analysis, see Collet 2013, p. 1-6.

111 For some exceptions, see Breen 2013, p. 209-210.

112 See Frier & Petit 2013, p. 376-377; Lombard, Dumont & Sirinelli 2013, p. 438-439.

113 Waline 2012, p. 439.

114 Lombard, Dumont & Sirinelli 2013, p. 250 and 253; Waline 2012, p. 439-440. See also Schwarze 2006, p. 875-876.

respected and cannot be revoked. However, this rule is not without exceptions. In cases explicitly provided for by law, administrative authorities indeed have the power to revoke individual administrative acts conferring rights. They will do so by means of an *actus contrarius*.<sup>115</sup>

In contrast, unlawful individual administrative decisions creating rights may be revoked within four months after the decision is signed. After the expiry of this period, the decision is affirmed. Nevertheless, two derogations from this rule should be taken into account. On the one hand, a considerable number of legal and regulatory provisions impose other time limits for the revocation of this category of administrative decisions. On the other hand, the time limit of four months does not apply if the beneficiary of the decision requests its revocation. In that case the administration is always allowed to revoke its decision, provided that the revocation does not affect the rights of third parties.<sup>116</sup>

#### 5.2.4.2.2 *Individual administrative decisions not creating rights*

Lawful individual administrative decisions that do not create nor confirm the existence of rights may be revoked at any time.<sup>117</sup> Evidently, the same goes for unlawful decisions of this kind. This means that administrative authorities have the discretion to revoke individual administrative decisions that do not create rights. Under this rule, police authorisations may be revoked without restrictions.<sup>118</sup>

As mentioned above, administrative decisions obtained by fraud or deliberate deception can never create rights (*supra*, Section 5.2.1).<sup>119</sup> Applying the maxim *fraus omnia corrumpit*, such decisions are always revocable. Permits, permissions or licences obtained by providing false information, threat, or bribery can thus be revoked at any time.

### 5.2.4.3 **Withdrawal of individual administrative acts**

#### 5.2.4.3.1 *Individual administrative decisions creating rights*

In line with the principle of non-retroactivity of administrative acts and the principle of protection of legitimate expectations, a lawful individual administrative decision creating rights cannot be withdrawn.<sup>120</sup> The lawfulness of the act implies that there is no valid ground for withdrawal. Since administrative authorities do not have any discretionary powers with regard to this category of administrative acts, considerations of expediency can never justify a withdrawal of these acts.<sup>121</sup> However, two important nuances must be

115 Lombard, Dumont & Sirinelli 2013, p. 255; Waline 2012, p. 443. See also Schwarze 2006, p. 883.

116 Frier & Petit 2013, p. 368; Lombard, Dumont & Sirinelli 2013, p. 255; Truchet 2013, p. 254-255.

117 Waline 2012, p. 443. See also Schwarze 2006, p. 883.

118 Lombard, Dumont & Sirinelli 2013, p. 255.

119 Auby & Cluzel-Métayer 2012, p. 13.

120 Lombard, Dumont & Sirinelli 2013, p. 251. See also Schwarze 2006, p. 878.

121 Waline 2012, p. 441.

pointed out. First, a lawful individual administrative decision conferring rights may be withdrawn when the law explicitly permits it.<sup>122</sup> Second, such an administrative decision may be withdrawn at the request of the decision's beneficiary, provided that the withdrawal does not affect the rights of third parties.<sup>123</sup>

An explicit<sup>124</sup> administrative decision which is unlawful, but nevertheless confers rights on an individual, may be withdrawn under conditions similar to those that apply to the revocation of such a decision. As a general rule, withdrawal is possible within four months after the decision is signed. However, this time limit does not apply if the decision's beneficiary requests<sup>125</sup> its withdrawal. In that case, the administration is always allowed to withdraw its decision, provided that the withdrawal does not affect the rights of third parties. Furthermore, specific legal or regulatory provisions<sup>126</sup> can prescribe a different time limit or can even stipulate that withdrawal is allowed at any time. In addition, it should be noted that unlawful administrative decisions creating rights may be inconsistent with European Union law and therefore must be withdrawn even if the time limit of four months has expired.<sup>127</sup>

In some exceptional cases, an administrative decision will be so gravely flawed as to be legally non-existent. Such *décisions inexistantes* may be withdrawn at any time. The administration will even be obliged to withdraw such void decisions.<sup>128</sup>

#### 5.2.4.3.2 *Individual administrative decisions not creating rights*

The principle of protection of legitimate expectations applies to administrative acts conferring rights, but this principle seems irrelevant for lawful administrative acts that do not create rights.<sup>129</sup> Although the withdrawal of these lawful administrative acts is in any case contrary to the principle of non-retroactivity and therefore – strictly speaking – prohibited<sup>130</sup>, the administration can nevertheless withdraw them as long as they remain unexecuted. In that case, withdrawal has the same effect as revocation.<sup>131</sup>

In accordance with the principle of legality, unlawful administrative decisions not creating rights may be withdrawn at any time. This obviously requires that their unlawful-

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122 Chrétien & Chiffot 2012, p. 526.

123 Chrétien & Chiffot 2012 526; Lombard, Dumont & Sirinelli 2013, p. 251; Waline 2012, p. 441.

124 For the withdrawal of implicit administrative decisions, see Chrétien & Chiffot 2012, p. 527; Frier & Petit 2013, p. 371-372; Lombard, Dumont & Sirinelli 2013, p. 252; Truchet 2013, p. 258.

125 The beneficiary of the decision may indeed have an interest in the withdrawal, e.g. if he hopes that the administration will take a more favorable decision (Truchet 2013, p. 258).

126 For an example, see Waline 2012, p. 442.

127 Frier & Petit 2013, p.372; Lombard, Dumont & Sirinelli 2013, p. 251-252.

128 Chrétien & Chiffot 2012, p. 528; Schwarze 2006, p. 880.

129 Waline 2012, p. 441.

130 Frier & Petit 2013, p. 257.

131 Lombard, Dumont & Sirinelli 2013, p. 252-253.



ness must have become apparent.<sup>132</sup> Again, the maxim *fraus omnia corrumpit* is of particular significance. Permits, permissions or licences obtained by providing false information, threat, or bribery can indeed be withdrawn at any time.

### 5.3 INSTRUMENTS TO SCREEN AND MONITOR PERSONS AND LEGAL ENTITIES

#### 5.3.1 *Screening and monitoring in specific sectors*

##### 5.3.1.1 The principle of freedom of trade and industry and its restrictions

The principle of freedom of trade and industry goes back to Article 7 of the *Décret d'Allarde* of 1791<sup>133</sup>, which is still in force today and is confirmed by Article 1 of the Act of 27 December 1973<sup>134</sup>. Moreover, this principle is considered a general principle of law, which, according to the Constitutional Council, even has constitutional status.<sup>135</sup> Nevertheless, the freedom of trade and industry is not unlimited. Within the context of this study, four types of restrictions are of particular importance. First, certain business activities can only be pursued by persons without a criminal record. This is, for instance, the case for bankers, insurers, and pub operators.<sup>136</sup>

Second, the criminal court may prohibit a convicted person from practicing a trade or engaging in a commercial or industrial occupation. This prohibition will be of a temporary – *i.e.* for a period of maximum fifteen years – or a permanent nature.<sup>137</sup> The prohibition to practice a trade is an optional penalty<sup>138</sup>, which can be imposed if the person concerned is convicted of an offence for which the law explicitly allows this kind of additional punishment. This is the case for a large number of criminal offences defined in the Criminal Code and in specific (criminal) laws<sup>139</sup>, as well as for tax-related offences<sup>140</sup>.

Third, the personal disqualification (*faillite personnelle*), imposed by a court pursuant to Articles L. 653-3 and following of the Commercial Code, entails a prohibition from running, managing, administering or controlling – directly or indirectly – any commercial or craftsman's business and any legal entity.<sup>141</sup> This personal disqualification is a professional

132 Frier & Petit 2013, p. 373; Truchet 2013, p. 258.

133 Loi du 2-17 mars 1791 portant suppression de tous les droits d'aides, de toutes les maîtrises et jurandes et établissement des droits de patentes.

134 Loi n° 73-1193 du 27 décembre 1973 d'orientation du commerce et de l'artisanat.

135 Dekeuwer-Défossez & Blary-Clément 2010, p. 126; Reinhard, Thomasset-Pierre & Nourissat 2012, p. 86.

136 Dekeuwer-Défossez & Blary-Clément 2010, p. 135.

137 Article 131-27, second paragraph Code pénal.

138 Vallansan & Vabres, nrs. 31 and 34.

139 For an overview, see Laborrier & Reygrobellet, nrs. 195-199; Vallansan & Vabres, nr. 31.

140 Article 1750 Code général des impôts. See Vallansan & Vabres, nrs. 44-45.

141 Article L. 653-2 Code de commerce. According to Article L. 653-8 of the Commercial Code, the court may also pronounce, instead of personal disqualification, a prohibition to practice a trade or run a business.

sanction, which can be imposed on traders and *de jure* or *de facto* managers of legal entities who have committed serious faults in the running of their business.<sup>142</sup> The duration of the personal disqualification will be determined by the court, but may not exceed fifteen years.<sup>143</sup>

Finally, the *Décret d'Allarde* had already provided that the freedom of trade and industry was subject to restrictions specified in police regulations. Currently, these restrictions are quite numerous.<sup>144</sup> In this context, it should be noted that some commercial activities are allowed only after prior notification of the competent authority (*déclaration*).<sup>145</sup> Furthermore, quite a lot of commercial activities require prior administrative authorisation (*autorisation préalable*).<sup>146</sup>

In the following sections, we discuss the licensing system for pubs and restaurants, the granting of casino licences, and the regulation of prostitution.

### 5.3.1.2 Licences for pubs and restaurants

Anyone looking to open a pub, bar or public house must submit a written statement to the mayor of the municipality involved or – in Paris – to the prefect of police at least fifteen days before the opening.<sup>147</sup> This statement must not only contain personal information about the applicant and information about the establishment, but must also include the *permis d'exploitation*<sup>148</sup>, which is obtained after completion of compulsory training on the rights and obligations of a pub or restaurant operator. The *permis d'exploitation* is valid for ten years. Extension for another ten years is only possible after attending a new training course.<sup>149</sup>

The mayor<sup>150</sup> immediately provides the applicant a statement, attesting that the latter has obtained the required tax licence.<sup>151</sup> This licence is a fiscal document, which has to be distinguished from the prior notification to the mayor. The mayor is not entitled to control the information provided by the person concerned, nor is he able to assess the competence of the applicant.<sup>152</sup> However, the mayor will transmit a copy of the written statement to

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142 Reinhard, Thomasset-Pierre & Nourissat 2012, p. 308. For an in-depth analysis, see: Laborrier & Reygrobellet nrs. 227-271.

143 Article L. 653-11, first paragraph Code de commerce.

144 Reinhard, Thomasset-Pierre & Nourissat 2012, p. 87-88.

145 See Dekeuwer-Défossez & Blary-Clément 2010, p. 139-140.

146 See Dekeuwer-Défossez & Blary-Clément 2010, p. 137-139; Kendérian, nrs. 36-38; Reinhard, Thomasset-Pierre & Nourissat 2012, p. 310-311.

147 Article L. 3332-3 Code de la santé publique.

148 Article L. 3332-3 Code de la santé publique.

149 See Article L. 3332-1-1 Code de la santé publique.

150 In Paris, the prefect of police.

151 Article L. 3332-4-1 Code de la santé publique. For a listing of the various types of licence, see Article L. 3331-1 and L. 3331-2 Code de la santé publique.

152 Ribière, nrs. 62, 71 and 77-84.

the public prosecutor and the prefect of the department.<sup>153</sup> Although the public prosecutor is not entitled to refuse the opening of the bar, he will assess the applicant's file and can, where appropriate, start an investigation. Furthermore, the public prosecutor will contact the tax authorities, charged with granting licences.<sup>154</sup>

The operation of a pub or restaurant is subject to legal requirements concerning such issues as the protection of minors, consumer protection, and the suppression of public drunkenness. These requirements are set out in the applicable legislation and further detailed in regulatory orders from the prefects of the departments.<sup>155</sup> The prefect of the department – or in Paris the prefect of police<sup>156</sup> – can order the closure of the pub or restaurant due to non-compliance with the operating conditions.<sup>157</sup> The closure of the establishment is temporary and applies for the term set by the prefect, on the understanding that the term will be no longer than six months. Except in cases involving gross negligence, the operator of the bar or restaurant will receive prior notice<sup>158</sup>, giving him the opportunity to rectify the situation and prevent closure of the premises. In any event, the decision to close a pub or restaurant may only be taken after the person concerned has been afforded the opportunity to present evidence in writing and, where appropriate and upon request, orally. The person concerned has the right to be assisted by a lawyer or to be represented by a proxy of his choice. Furthermore, the prefect must notify the person concerned in writing of the legal and factual grounds underlying the closure decision (*supra*, Section 5.2.2).<sup>159</sup>

It should be noted that the Minister of the Interior is also empowered to order the closure of a pub or restaurant. The only difference between that power and the power of the prefect is the duration of the closure. According to Article L. 3332-16 of the *Code de la santé publique*, the Minister of the Interior can order a closure for a period of between three months and a year.

In principle, the closure of the bar or restaurant does not imply the revocation of the *permis d'exploitation*. However, the operating licence will be revoked if the bar or restaurant is closed due to a criminal offence relating to its actual operation or its customers. In such cases, the closure can be ordered immediately for a period of six months.<sup>160</sup> Although these cases involve closing an establishment as a result of a criminal offence, the Council of State

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153 Article L. 3332-3 Code de la santé publique.

154 Ribière, nrs. 74-76.

155 Ribière, nrs. 152-169 and 176-180.

156 Article L. 3332-15, 6° Code de la santé publique.

157 Article L. 3332-15, 1° Code de la santé publique. An establishment open to the public can also be closed if it does not comply with applicable safety rules (Article L. 123-4 Code de la construction et de l'habitation; see De Fay, nrs. 134-138).

158 Article L. 3332-15, 1° Code de la santé publique.

159 Article L. 3332-15, 5° Code de la santé publique.

160 Article L. 3332-15, 3° and 4° Code de la santé publique.

has ruled that these closures too are administrative police measures rather than administrative sanctions. Indeed, the ultimate intention of the measure is to maintain or restore public order and not to sanction the person concerned.<sup>161</sup>

Pursuant to Article L. 3352-6 of the *Code de la santé publique*, non-compliance with a closure order is punishable by two months' imprisonment and a fine of € 3.750.

### 5.3.1.3 Casino licences<sup>162</sup>

Since the 19th century, French gambling policy has been based on a general prohibition of all forms of gambling, mitigated by a number of specific exemptions.<sup>163</sup> According to this approach, three types of gambling activities are allowed: lotteries, betting on horse races, and casinos and gaming circles. Because the State has a monopoly in the former two sectors, in which only State-controlled enterprises are permitted to operate, casinos and gaming circles<sup>164</sup> are the only gambling sector in which private companies are allowed to supply services.<sup>165</sup> However, as we will see, the regulatory framework for casinos is quite restrictive – Senator F. Truchy even calls it ‘utterly draconian’<sup>166</sup> – and closely monitored. The stringent regime can be regarded as a result of the commitment of the French authorities to prevent and counteract the potential and undesirable side effects of casino gambling, such as money laundering and forms of tax and financial fraud.<sup>167</sup>

Casinos are establishments where on the one hand games of chance are operated and on the other shows are organised and catering is offered.<sup>168</sup> Currently, there are 198 casinos in France<sup>169</sup>, the majority of which are owned by four large groups of companies.<sup>170</sup> The relatively low number of casinos is a consequence of Article L. 321-1 of the *Code de la sécurité intérieure*, according to which casinos may only be established in municipalities classified as seaside resorts, spas, climatic health resorts, or tourist resorts. This restriction

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161 Crucis & Breen, nr. 25; Pontier 2013; Tchen, nr. 60.

162 In this part, we only discuss the regulatory framework for land-based casinos. It should be noted that Act n° 2010-476 of 12 May 2010 (Loi n° 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne) contains provisions relating to Internet gambling. See Jouette Melchior 2011 237-249; Péraldi Leneuf 2011, p. 219-236.

163 See Littler 2009, p. 65-66.

164 In contrast to casinos, gaming circles (*cercles de jeux*) are non-profit organisations (*associations*) composed of members who pay an annual membership fee. Except for slot machines, gaming circles organise games of a nature similar to those offered by casinos, it being understood that gambling in gaming circles – in view of their legal form – is strictly limited to members (Littler 2009, p. 79. See also Truchy 2008, p. 131). Gaming circles are regulated by the Decree of 5 May 1947 (Décret n°47-798 du 5 mai 1947 portant réglementation de la police des jeux dans les cercles).

165 Littler 2009, p. 71 and 74; Truchy 2008, p. 129-130.

166 Truchy 2008, p. 131.

167 Littler 2009, p. 67.

168 Article 1 Arrêté du 14 mai 2007 relatif à la réglementation des jeux dans les casinos.

169 Casinos De France 2014, p. 3.

170 European Casino Association 2013, p. 44. See also Nikkinen 2014, p. 21.

goes back to the Act of 15 June 1907<sup>171</sup> and implies that casinos are basically limited to a small percentage of municipalities, regarded as tourist destinations, with a relatively small residential population. However, under certain conditions, a casino can also be set up in the principal city of agglomerations with a total of more than 500.000 inhabitants.<sup>172</sup> On this basis, cities like Lyon, Nice and Toulouse granted an authorisation for the exploitation of a casino.<sup>173</sup>

A casino can only be operated based on a temporary licence<sup>174</sup>, which is granted by the Ministry of Interior taking into consideration the specifications put forward by the municipal council in the *cahier des charges*.<sup>175</sup> This enables municipalities to conclude agreements with candidates for the operation of a casino.<sup>176</sup> In this context, municipalities can not only levy taxes, but can also demand that casino operators invest in cultural and sport-related activities.<sup>177</sup> Furthermore, the agreements often stipulate that casino operators must contribute to funding treatment centres and helplines to help players who are vulnerable to gambling addiction.<sup>178</sup>

The applicant for a licence must submit an application (*dossier*) to the prefect of the department where the casino will be located. The application must contain the relevant information with regard to the company's share capital and those controlling it. The *cahier des charges* must also be included.<sup>179</sup> The prefect of the department will transmit the application, together with the results of his administrative investigation<sup>180</sup>, to the Ministry of Interior, which will take a decision about the granting of the licence after consulting the *Commission consultative des jeux de cercles et de casinos*.<sup>181</sup> This consultative commission examines not only the information provided by the applicant, but also the advice provided by the municipal council, the prefect of the department, and the *Service Central des Courses et Jeux*, which is part of the Central Directorate of the Judicial Police. The *Service Central des Courses et Jeux* performs an in-depth investigation of the applicant's background, his financial integrity, and the source of his fund. The opinion of the *Commission consultative des jeux de cercles et de casinos* is purely advisory. The final decision regarding whether or not to grant a licence, is taken by the Minister of the Interior, who has a discretionary power. This decision and its justifications are made public.<sup>182</sup>

171 Truchy 2008, p. 129.

172 See Article L. 321-1, 2° Code de la sécurité intérieure.

173 Littler 2009, p. 76.

174 Article L. 321-1 Code de la sécurité intérieure.

175 Article L. 321-2 Code de la sécurité intérieure.

176 Rouault & Ribeyre, nr. 226.

177 Littler 2009, p. 78 and 85.

178 European Casino Association 2013, p. 45.

179 Article R. 321-2 Code de la sécurité intérieure. See Rouault & Ribeyre, nrs. 231-232.

180 See Rouault & Ribeyre, nr. 233.

181 See Article R. 321-4 and Article R. 321-7 to R. 321-12 Code de la sécurité intérieure.

182 European Casino Association 2013, p. 17.

The licence to operate a casino is granted by means of an order of the Minister of the Interior that stipulates, *inter alia*, the duration of the authorisation and the operating hours.<sup>183</sup> Once a licence is granted, the Ministry of the Interior will continue to monitor the casino's operations<sup>184</sup>, which means that the *Service Central des Courses et Jeux*<sup>185</sup> will conduct inspections on a regular basis. Furthermore, officials from the Ministry of Finance examine and analyse the accounting and financial records of casino operators.<sup>186</sup> In that respect, the Minister of the Interior is empowered, after considering the advice of the *Commission consultative des jeux de cercles et de casinos*<sup>187</sup>, to suspend and even revoke a licence. A suspension for a maximum of four months or a partial or total revocation is allowed in cases of non-compliance with the *cahier des charges*, the requirements of the licence, or the applicable regulations.<sup>188</sup>

### 5.3.1.4 The regulation of prostitution

#### 5.3.1.4.1 The abolitionist regime

Since 1960<sup>189</sup>, French prostitution policy has been based on an abolitionist approach, according to which commercial sex is seen as a private occupation and a matter of individual choice and responsibility, outside the realm of state intervention.<sup>190</sup> This policy is based on two fundamental principles. To begin with, prostitutes are regarded as victims of social maladjustment and/or of pimps who force them to practice prostitution.<sup>191</sup> This explains the importance attached to the social support of prostitutes, to measures that help them leave the prostitution sector, and to the prevention of social conditions that impose risks leading to persons ending up in the sector.<sup>192</sup> The second principle is the criminalisation of the exploitation of prostitution. Procuring and associated offences, punishable under Article 225-5 *et seq.* of the Penal Code, are regarded as offences against the dignity of persons. Procuring includes not only helping, assisting or concealing the prostitution of others,

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183 See Article L. 321-2 and Article R. 321-5 Code de la sécurité intérieure.

184 See Article R. 321-38; European Casino Association 2013, p. 45.

185 More precisely its *Division de la surveillance générale des casinos et des cercles*.

186 Casinos De France 2014, p. 13.

187 In urgent cases, the Minister of the Interior can suspend the licence for a maximum of two months without advice from the consultative commission.

188 Article L. 321-2, Article R. 321-10 and Article R. 321-30 Code de la sécurité intérieure.

189 In that year, France ratified the United Nations Convention of 2 December 1949 "for the suppression of the traffic in persons and of the exploitation of the prostitution of others". As a consequence, prostitution shifted from being treated as a public health issue to a social problem (Mathieu 2012, p. 205).

190 Mathieu 2004, p. 153-154.

191 Mathieu 2012, p. 203.

192 Mazur 2004, p. 123.

but also profiting from the prostitution of others and hiring, training, corrupting or pressuring a person with a view to prostitution.<sup>193</sup>

In its initial form, the abolitionist regime implied the abolition of the regulation of prostitution which was in force until 1960, but not necessarily the abolition of prostitution itself. However, French prostitution policy is, to a certain extent, characterised by a lack of consensus over the ultimate meaning – and consequently the aims – of abolitionism.<sup>194</sup> In this respect, the National Assembly passed a non-binding resolution on the 6th of December 2001, reaffirming France's abolitionist position, specifying, however, that the long-term objective is a 'society without prostitution'.<sup>195</sup> Nevertheless, individual prostitution is not illegal<sup>196</sup> and although prostitution may be an undesirable phenomenon and is not considered a real profession, prostitutes must still pay income taxes and social security contributions.<sup>197</sup> Despite this, the freedom of prostitutes to pursue their activity has been substantially restricted.

First, the Marthe Richard Act of 13 April 1946 ordered the closure of the *maisons de tolérance*. Before this Act entered into force, licensing brothels was regarded as an appropriate means for the authorities to keep prostitution under strict supervision and to impose moral and medical control on the prostitutes.<sup>198</sup> However, the regulation of prostitution as a form of labour was criticised because it would amount to a form of state support towards a system of exploitation of women.<sup>199</sup> As a consequence, the Act of 13 April 1946 introduced a complete ban on brothels and other prostitution establishments, which currently still applies. This means that prostitutes are required to work in a totally independent and autonomous way.<sup>200</sup> Although they have the right to work in private<sup>201</sup> in their own home<sup>202</sup>, in practice street prostitution is the most common form of prostitution.

At the end of the 1990s the prostitution sector in general and street prostitution in particular underwent a transformation, prompted by the fact that French cities were being confronted with a large number of migrant prostitutes from Eastern Europe. These pros-

193 Article 225-5 Code pénal.

194 St. Denny 2014, p. 6.

195 Résolution réaffirmant la position abolitionniste de la France en matière de prostitution, *Assemblée Nationale* 2012-2012, n° 782. For a critical assessment, see St. Denny 2014, p. 10-13.

196 Mazur 2004, p. 123.

197 Rassat 2011, p. 689. See also Mazur 2004, p. 124; Mathieu 2012, p. 204.

198 Mathieu 2012, p. 204.

199 St. Denny 2013, p. 6.

200 Mathieu 2012, p. 204.

201 Mazur 2004, p. 137.

202 Conte 2013, p. 317. Pursuant to Article 225-10, 3° of the Penal Code, anyone who sells or makes available to one or more persons any premises or places not open to the public, in the knowledge that those persons will engage in prostitution there, is liable to a penalty of ten years' imprisonment and a fine of € 750,000. This means that, for instance, the landlord who rents out a house or a flat to a prostitute, knowing that it will be used for prostitution, can be prosecuted. The same goes for a real estate agency, selling a house or a flat to a prostitute (see Rassat 2011, p. 705 and 711-712).

titutes started to operate in areas that had never been affected by prostitution, or at any rate had not been affected by it for several years. Moreover, these prostitutes seemed to operate under the strict control of organised procuring networks.<sup>203</sup> As a consequence of this evolution, the traditional abolitionist approach came under pressure, which resulted in a partial policy shift. Since then, French prostitution policy has increasingly framed prostitution as a safety and public order issue which should be tackled by police action.<sup>204</sup> This has resulted in several initiatives at the local and national level.

On the one hand, in 2002, numerous cities developed a strict anti-prostitution policy. Within the framework of their power to impose the administrative police measures necessary to maintain public order (*infra*, Section 5.4.4), cities like Strasbourg, Metz, Lyon and Aix-en-Provence prohibited prostitution in parts of their territory.<sup>205</sup>

At national level, the Domestic Security Act of 18 March 2003<sup>206</sup> created a legal basis for the expulsion of migrant prostitutes. In addition, this Act reintroduced the offence of passive soliciting. According to Article 225-10-1 of the Penal Code<sup>207</sup>, publicly soliciting another person by any means, including passive conduct, with a view to inciting them to engage in sexual relations in exchange for remuneration<sup>208</sup> is punishable by two months' imprisonment and by a fine of € 3.750. This statutory provision has far-reaching consequences, since it essentially means that the mere presence of prostitutes in the urban space is punishable. Furthermore, the criminalisation of passive soliciting can easily lead to an arbitrary repression of prostitutes on the streets<sup>209</sup>, which may in turn lead to an increase of prostitution in indoor premises, such as bars, nightclubs, hotels or private flats.<sup>210</sup> Taking into account these criticisms and concerns, the National Assembly and the Senate recently approved a bill providing for the repeal of Article 225-10-1 of the Penal Code.<sup>211</sup>

The decriminalisation of passive soliciting does not mean that prostitution is no longer regarded a problematic issue. This is clearly evidenced by the various attempts over the last decade to implement a policy of criminalisation of the purchase of sexual services.<sup>212</sup> In December 2013, the National Assembly approved a legislative proposal that would make

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203 Mathieu 2004, p. 206-207; Mathieu 2012, p. 160.

204 Mathieu 2012, p. 207; St. Denny 2013, p. 8.

205 Mathieu 2004, p. 161.

206 Loi n° 2003-239 du 18 mars 2003 pour la sécurité intérieure.

207 As introduced by Article 50 of the Domestic Security Law.

208 Or a promise of remuneration.

209 Mathieu 2012, p. 204-205 and 207-208.

210 Mathieu 2004, p. 162.

211 See Article 13 Proposition de loi adoptée par l'Assemblée Nationale, renforçant la lutte contre le système prostitutionnel, transmise par M. le Président de l'Assemblée Nationale à M. le Président du Sénat, *Sénat* 2013-2014, n° 207; Article 13 Proposition de loi adoptée par l'Assemblée Nationale, renforçant la lutte contre le système prostitutionnel. Texte de la Commission Spéciale, *Sénat* 2013-2014, n° 698.

212 See St. Denny 2012.



it possible to punish clients of prostitutes<sup>213</sup>, which would be tantamount to the *de facto* prohibition of prostitution.<sup>214</sup> However, the Senate rejected this proposal in July 2014.<sup>215</sup>

#### 5.3.1.4.2 *The closure of premises*

Anyone who, acting directly or through an intermediary, holds, manages, exploits, directs, operates, finances or contributes to financing a place of prostitution is liable to a penalty of ten years' imprisonment and a fine of € 750.000.<sup>216</sup> In addition, it is forbidden to accept or habitually tolerate prostitution or soliciting clients with a view to prostitution in any given place open to or used by the public. The holder, manager, operator or financier of such places is liable to the same penalties.<sup>217</sup>

When a prosecution is initiated based on the above offences, the investigating judge may order the temporary closure of the premises whose occupier, manager, or employee is prosecuted. Furthermore, the investigating judge may order the closure of the places listed in Article 706-36, 2° of the Code of Criminal Procedure. This concerns any hotel, furnished house, pension, bar, restaurant, club, dance hall, place of entertainment, or its outbuildings open to or used by the public. These places can be closed if it appears that a person prosecuted for a prostitution offence has been found to have been knowingly offered assistance by the management or personnel to destroy evidence, exercise pressure on witnesses, or encourage the continuation of his unlawful activities.<sup>218</sup>

In both cases, the complete or partial closure of premises is only temporary and applies for the term set by the investigating judge, on the understanding that the maximum term is three months. Whatever its initial duration, the closure may be repeatedly extended under the same procedure by terms of no longer than three months. This implies that the investigating judge can decide to continue the closure of an establishment for the duration of the preliminary inquiry.<sup>219</sup> Furthermore, the court hearing the case can decide to renew the closure measure for a maximum term of three months on each occasion.<sup>220</sup> This must be viewed in the context of Article 225-22 of the Criminal Code, according to which natural and legal persons convicted of the offences set out under Article 225-10 of the Criminal Code incur the additional penalty of the mandatory closure, either permanently or for a

213 See Article 16 Proposition de loi adoptée par l'Assemblée Nationale, renforçant la lutte contre le système prostitutionnel, transmise par M. le Président de l'Assemblée Nationale à M. le Président du Sénat, *Sénat* 2013-2014, n° 207.

214 St. Denny 2013, p. 3. See also St. Denny 2014, p. 4, 8 and 13-16.

215 See Proposition de loi adoptée par l'Assemblée Nationale, renforçant la lutte contre le système prostitutionnel. Texte de la Commission Spéciale, *Sénat* 2013-2014, n° 698, 12.

216 Article 225-10, 1° Code pénal.

217 Article 225-10, 2° Code pénal. The decision to prosecute will be recorded in the trade register and in the securities registers (see Article 706-37 Code de procédure pénale).

218 Article 706-36 Code de procédure pénale.

219 Rassat 2011, p. 729-730.

220 Article 706-36 Code de procédure pénale.

maximum period of five years, of the entire establishment or the parts of it that were used for the purpose of prostitution.<sup>221</sup> In addition, their business assets will be confiscated.<sup>222</sup>

These additional penalties can be imposed even if the person concerned is not prosecuted. However, he has the right to present his opinion during the hearing. To this end, the public prosecution service must summon the person concerned and inform him about the actual prosecution and the possibility of additional penalties.<sup>223</sup>

#### 5.3.1.4.3 *Withdrawal of bar or restaurant licences*

Natural and legal persons convicted of the offences set out under Article 225-10 of the Criminal Code are subjected to the additional penalty of permanent withdrawal of their bar or restaurant licence.<sup>224</sup> In this case too, the licence can be withdrawn if the holder is not prosecuted, provided that he was summoned and afforded the opportunity to be heard.<sup>225</sup>

Furthermore, a conviction for one of the offences listed in Article 225-10 of the Criminal Code automatically implies that the person concerned is no longer allowed to run a public house.<sup>226</sup>

#### 5.3.2 *Public procurement law*

France has incorporated Article 45 of Directive 2004/18/EC<sup>227</sup> and Article 39 of Directive 2009/81/EC<sup>228</sup> into its domestic public procurement legislation.<sup>229</sup> Therefore, candidates

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221 Article 225-22, 2° Code pénal. This additional penalty *ipso facto* leads to the suspension of the licence for the same period (Rassat 2011, p. 722).

222 Article 225-22, 3° Code pénal. See Rassat 2011, p. 722-723.

223 See Article 706-38 Code de procédure pénale.

224 Article 225-22, 1° Code pénal.

225 See Article 706-38 Code de procédure pénale.

226 Article L. 3336-2, 1° Code de la santé publique. See Rassat 2011, p. 721.

227 Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *O.J.* 2004, L 134/114. It should be noted that public procurement rules adopted pursuant to Directive 2004/18/EC were revised and modernised by Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (*O.J.* 2014, L 94/65), which contains significant additions to both the mandatory and discretionary grounds for the exclusion of economic operators from participation in a procurement procedure. Member States are required to enact the laws, regulations and administrative provisions necessary to comply with Directive 2014/24/EU by 18 April 2016. Directive 2004/18/EC was repealed with effect from that date.

228 Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, *O.J.* 2009, L 216/76.

229 See Article 43 Code des marchés publics 2006; Article 8 and Article 38 Ordonnance n° 2005-649 du 6 juin 2005 relative aux marchés passés par certaines personnes publiques ou privées non soumises au code des marchés publics. For a critical analysis, see Dal Farra 2011, nr. 74, 2-11.

or tenderers are excluded from participation in a procurement procedure if they have been finally convicted in the last five years of one of the offences listed in Article 8, 1° and 2° of Ordinance n° 2005-649 of 6 June 2005. These include the participation in a criminal association, money laundering, fraud, corruption, trafficking in influence, and acts of terrorism. Furthermore, companies in the process of liquidation are excluded from participation in a procurement procedure.<sup>230</sup> The same goes for applicants who did not comply with their legal obligation to pay taxes or social security contributions in the year preceding the tender.<sup>231</sup>

Candidates or tenderers will need to certify that they are not in one of these situations. To do this, they have to submit a declaration of honour.<sup>232</sup> With regard to non-compliance with tax and social security obligations, the competent agency can issue a certification of compliance if the person concerned has rectified the situation and has paid the taxes and social security contributions.<sup>233</sup>

#### 5.4 INSTRUMENTS DIRECTED AT PREVENTING THE DISTURBANCE OF PUBLIC ORDER

##### 5.4.1 *The police powers of the prefect of the department*

The prefect of the department is a key player in the field of administrative policing. He is not only responsible for public order (*ordre public*) and safety in his department, but also – in the context of national security – for preparing and executing the measures of internal, civil and economic security.<sup>234</sup> The concept *ordre public* encompasses the three classical components of public safety, public health, and public peace<sup>235</sup>, along with, according to the case law of the Council of State, the respect for human dignity.<sup>236</sup> Since the purpose of the administrative police is to prevent breaches of public order<sup>237</sup>, the prefect can, in his capacity as *autorité de police administrative*<sup>238</sup>, take all appropriate measures with a view to safeguarding public order. Additionally, the prefect is also entrusted with administrative policing powers in a number of specific fields. These *police spéciales* relate, *inter alia*, to

230 Article 8, 3° Ordinance n° 2005-649 of 6 June 2005.

231 Article 8, 4° Ordinance n° 2005-649 of 6 June 2005.

232 Article 44, I, 2° Code des marchés publics 2006.

233 X s.l.n.d., p. 5.

234 Article 11 Decree n° 2004-374 of 29 April 2004. In a limited number of departments, the prefect is assisted by a *préfet adjoint pour la sécurité*, who deals exclusively with security matters (Waline 2012, p. 94-95).

235 See Article L. 2212-2 CGCT.

236 Frier & Petit 2013, p. 293-294; Lombard, Dumont & Sirinelli 2013, p. 348; Serrand 2012, p. 81-82; Truchet 2013, p. 307-308.

237 Waline 2012, p. 352-353.

238 Chrétien & Chifflet 2012, p. 145.

inspections in railway stations and airports and the closure of dangerous or unhealthy establishments.<sup>239</sup>

Pursuant to Article 34, first paragraph of Act n° 82-213 of 2 March 1982<sup>240</sup>, the prefect of the department heads the department's state services. It follows that the police assists the prefect and that the latter is empowered to give instructions to both the national police and the gendarmerie.<sup>241</sup> Whereas the prefect of the department carries out most of his tasks under the authority of the prefect of the region (*supra*, Section 5.1.1), this is not the case for maintaining public order, which is an exclusive power of the prefect of the department. The regional prefects are not responsible for the maintaining public order and consequently have no police powers.<sup>242</sup>

The prefect's decisions usually take the form of orders (*arrêtés*), which can be of a regulatory nature, e.g. police regulations, or an individual nature, e.g. authorisations or permits.<sup>243</sup> The responsibility of the prefect to maintain public order must be distinguished from the mayor's responsibility in this field. The division of powers between both authorities is set out in Article L. 2215-1 of the *Code général des collectivités territoriales*. The basic principle is that the mayor ensures the so-called *police municipale* and is thus responsible for maintaining public order in his municipality. However, the following restrictions apply.

First, the powers of the mayor are obviously limited to the territory of the municipality.<sup>244</sup> Measures relating to public order, public safety, public security and public health, whose scope of application is not restricted to one municipality, can thus only be taken by the prefect of the department.<sup>245</sup> Given the small scale of many municipalities, this situation frequently occurs. Second, in the event of disturbance of public order in two or more adjacent municipalities, the prefect can take a well-reasoned decision to use his power of substitution. This permits him to exercise certain of the mayor's police powers<sup>246</sup>, which contributes to the cohesiveness of administrative policing.<sup>247</sup> Third, the prefect of the department can intervene in cases where the mayor fails to act. If the mayor does not comply with a notice given by the prefect, the latter can take all measures necessary to

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239 Chrétien & Chiffot 2012, p. 241.

240 Loi n° 82-213 du 2 mars 1982 relative aux droits et libertés des communes, des départements et des régions.

241 Chrétien & Chiffot 2012, p. 241; Maillard Desgrées Du Loû 2011, p. 377.

242 Lombard, Dumont & Sirinelli 2013, p. 145.

243 Chrétien & Chiffot 2012, p. 241; Waline 2012, p. 96.

244 Truchet 2013, p. 310.

245 Article L. 2215-1, 3° CGCT.

246 It concerns the powers mentioned in Article L. 2212-2, 2° and 3° and Article L. 2213-23 of the *Code général des collectivités territoriales*. See Article L. 2215-1, 2° CGCT.

247 Waline 2012, p. 360.

maintain public safety, health, and peace.<sup>248</sup> Here again, the prefect uses his power of substitution.<sup>249</sup>

#### 5.4.2 *The police powers of the mayor*

The far-reaching powers of the prefect of the department aside, the mayor still plays an important role in the area of administrative policing.<sup>250</sup> Acting as an *autorité de police administrative*, the mayor is entrusted with the *police municipale*.<sup>251</sup> This concept of municipal police should first of all be understood in a functional sense, meaning that the mayor, within the limits indicated above and under the administrative control of the prefect of the department, is responsible for maintaining public order in his municipality.<sup>252</sup> This implies that the mayor ensures order, safety, security and public health in his municipality.<sup>253</sup> In light of this, he has the power to issue police regulations. Furthermore, the mayor promotes and coordinates the crime prevention policy in his municipality.<sup>254</sup> In that context, a local security and crime prevention council – presided over by the mayor – is established in municipalities with more than 10,000 inhabitants and in municipalities that include a sensitive urban area (*zone urbaine sensible*)<sup>255 256</sup>.

It should be noted that the mayor is also officer of the judicial police.<sup>257</sup> In that respect, Article 40, second paragraph of the Code of Criminal Procedure (CPP) sets out the mayor's obligation to notify the district prosecutor immediately of any felony or misdemeanour of which he has knowledge, and to transmit any relevant information, official reports, or documents.

The mayor's responsibility for the *police municipale* does not imply that each municipality has its own local police force. On the contrary, the French police system is largely centralised, comprising the *Police Nationale* and the *Gendarmerie Nationale*. Currently only a small number of municipalities – approximately 3,500 – have their own municipal police force, acting under the direct authority of the mayor.<sup>258</sup>

248 Article L. 2215-1, 1° CGCT.

249 Frier & Petit 2013, p. 300; Waline 2012, p. 360.

250 Waline 2012, p. 145.

251 Frier & Petit 2013, p. 296.

252 Article L. 2212-1 CGCT.

253 See Article L. 2212-2 CGCT.

254 Article L. 132-4 Code de la sécurité intérieure (CSI).

255 As defined by Article 42, nr. 3 of the Act of 4 February 1995 (Loi n° 95-115 du 4 février 1995 d'orientation pour l'aménagement et le développement du territoire).

256 Article L. 132-4 Code de la sécurité intérieure (CSI).

257 Lombard, Dumont & Sirinelli 2013, p. 142.

258 Donnelly 2013, p. 37. For a detailed analysis of the municipal police forces, see De Fay, nrs. 310-393.

Furthermore, the state police regime (*régime de la police d'État*)<sup>259</sup> must be taken into account. On the one hand, this regime applies to the department capitals.<sup>260</sup> On the other hand, the Ministers of Home Affairs and Finance, following a request from the municipal council or with its agreement, can decide to implement the state police regime in municipalities with more than 20.000 inhabitants that are confronted with the nature and extent of delinquency typical of urban areas.<sup>261</sup> The *régime de la police d'État* not only implies that the police services are financed exclusively by the State and that all police officers are State personnel, but also that the prefect of the department is responsible for maintaining public order in the strict sense.<sup>262</sup> In these municipalities, the prefect can take all the necessary measures to prevent and suppress violations of the public peace.<sup>263</sup> As a consequence, the police powers of the mayor are significantly reduced.<sup>264</sup>

#### 5.4.3 *The Prefecture of Police of Paris*

The Paris metropolitan area enjoys special status in the French administrative system, which has its historical roots in the Napoleonic era<sup>265</sup> and is, with regard to security management, reflected in the fact that the powers of the municipal police are executed by the prefect of police (*préfet de police*)<sup>266</sup>, who heads the Prefecture of Police of Paris (*Préfecture de police de Paris*). The territorial competence of the prefect of police is not restricted to the Paris department, but also covers the *petite couronne*, i.e. the three surrounding departments: Hauts-de-Seine, Seine-Saint-Denis and Val-de-Marne.<sup>267</sup> All police forces within the city of Paris and the *petite couronne* are obliged to report directly to the prefect of police.<sup>268</sup>

The powerful position of the prefect of police does not imply that the mayor of Paris is uninvolved in the maintenance of public order, but his powers are limited to the domains of public health, fairs and markets, and traffic and parking.<sup>269</sup> To this end, the mayor is

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259 See Tchen, nrs. 160-166.

260 Article R. 2214-1 CGCT.

261 If the municipal council does not agree, such a regime can be imposed by decree of the Council of State. See Article L. 2214-1 and Article R. 2214-2 CGCT.

262 Chrétien & Chiffot 2012, p. 559; Serrand 2012, p. 88-89; Waline 2012, p. 360.

263 Article L. 2214-4 and Article L. 2212-2, 2° CGCT. The mayor will take measures responding to neighbourhood disturbances.

264 See Frier & Petit 2013, p. 297.

265 Order of 1 July 1800 (12 messidor an VIII) determining the functions of the prefect of police.

266 Article L. 2512-13, first paragraph CGCT; Article L. 131-2 Code de la sécurité intérieure (CSI).

267 Article L. 122-2 CSI.

268 Mouhanna 2010, p. 31.

269 Frier & Petit 2013, p. 198; Serrand 2012, p. 89.

assisted by the *Direction de la Prévention et de la Protection*, which consists of surveillance and protection agents, mainly entrusted with the protection of municipal facilities.<sup>270</sup>

#### 5.4.4 *Administrative police measures*

##### 5.4.4.1 **Concept, scope, and limitations**

Administrative police measures are by their very nature unilateral acts that impose obligations upon citizens. As discussed in Section 5.2.1, a distinction must be made between regulatory and individual acts. Whereas the former have general scope and apply – depending on the case – across the territory of the department or the municipality, the latter are addressed to a specific person and contain a prohibition, an injunction, a suspension or a requisition.<sup>271</sup>

The competent administrative authorities are obliged to take all measures necessary to maintain public order.<sup>272</sup> However, this obligation does not imply that the powers of the prefect of the department, the mayor, and other administrative police authorities are unlimited. According to the Council of State case law, freedom is indeed the rule and its restriction by the authorities must remain the exception.<sup>273</sup> This means that an administrative police measure will only be legal to the extent it is necessary to maintain public order, which implies that the competent *autorité de police administrative* must balance the interests of individual freedom against the maintenance of public order. This balancing act is done by means of three criteria. First, public order must actually have been disturbed or be in danger of being disturbed. In this context, the seriousness of the disturbance needs to be assessed. Second, the importance of the fundamental freedom at stake and of its infringement must be evaluated.<sup>274</sup> Infringement of an individual liberty must be avoided as much as possible and is justified only to the extent that no other possibility exists.<sup>275</sup> Furthermore, unless the law explicitly allows it, police authorities cannot subject the exercise of legally guaranteed freedoms to either prior authorisation or advance notification.<sup>276</sup> Third, the proportionality principle must be taken into account. This not only implies that the restriction imposed on the person concerned must be proportionate to the disturbance of public order, but also that – from the broader perspective of all admin-

270 Mouhanna 2010, p. 32.

271 Frier & Petit 2013, p. 303.

272 See Frier & Petit 2013, p. 301-302; Lombard, Dumont & Sirinelli 2013, p. 356-357.

273 Frier & Petit 2013, p. 304; Waline 2012, p. 362.

274 Frier & Petit 2013, p. 305.

275 Lombard, Dumont & Sirinelli 2013, p. 355.

276 Waline 2012, p. 363.

istrative police measures available – only the necessary or indispensable, *i.e.* the least drastic measure must be applied.<sup>277</sup>

Although it follows from the above that general prohibitive measures are generally forbidden, an outright prohibition of certain activities is nevertheless permissible in exceptional cases, such as those involving practices that are contrary to human dignity.<sup>278</sup> More generally, it can be observed that an increasing feeling of insecurity seems to lead to a greater acceptance of the legitimacy of prohibitive measures taken by municipal authorities.<sup>279</sup>

#### 5.4.4.2 The revocation of an authorisation

As discussed in Section 5.2.3, the revocation of an authorisation can be an administrative sanction and a police measure, depending on the predominant motive of the administrative authority. In the context of maintaining public order, administrative authorities may, under certain conditions, revoke an authorisation if the continuation of the authorised activity would provoke disorder and illegal conduct. Although the revocation will in these cases often be the consequence of irregularities detected, it is not used as a means of sanctioning such irregularities. The rationales underlying the administrative decision are to prevent further infringements and to protect public order or third-party interests. As a consequence, the revocation of the authorisation is in this case not a sanction, but merely an administrative police measure.<sup>280</sup>

In applying this preventive approach, the authorisation to work in a casino can, for instance, be revoked when irregularities are detected. Another typical example is the revocation of the authorisation to sell alcohol in a bar after it becomes apparent that the bar is a meeting place for criminals, and taking into account that a fake passport and a gun have been found on the premises.<sup>281</sup>

If an authorisation is revoked due to a disturbance of public order, the procedural guarantees will be less strict than those applicable in cases in which an authorisation is revoked as an administrative sanction, since the principle of legality of offences and punishments as well as the rights provided for in Article 6, § 1 ECHR do not apply to administrative police measures.<sup>282</sup> However, the person concerned must be informed of the grounds for the revocation of the authorisation. Moreover, in principle such a police measure cannot be taken before affording the person concerned the opportunity to be

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277 Frier & Petit 2013, p. 305; Lombard, Dumont & Sirinelli 2013, p. 354-355.

278 Frier & Petit 2013, p. 305-306.

279 Waline 2012, p. 364.

280 Breen 2013, p. 205.

281 Breen 2013, p. 205.

282 Breen 2013, p. 198; Frier & Petit 2013, p. 304; Petit 2013, p. 2-3.



heard, which implies that he must be notified of the intended revocation and must be afforded the opportunity to examine the file (*supra*, Section 5.2.2).<sup>283</sup>

#### 5.4.4.3 The closure of pubs, restaurants and discotheques

Pursuant to his powers as *autorité de police administrative*, the mayor can order the temporary closure of a pub or restaurant if it is operated in such a way that it endangers public order. Grounds must be provided for the provisional closure of an establishment. Given that this measure is intended to maintain public order and is therefore not an administrative sanction, the closure will be limited to the period necessary to restore public order.<sup>284</sup>

Furthermore, the police powers of the prefect must be taken into account. On the one hand, the prefect of the department – or in Paris the prefect of police<sup>285</sup> – can order the closure of a pub or restaurant in the case of a violation of public order, health, peace, or morality, provided that this violation relates to the actual operation or customers of the bar or restaurant. The closure has a maximum duration of two months, although the prefect can set a shorter period if the operator agrees to attend a course to obtain a business licence.<sup>286</sup> On the other hand, the prefect of the department – or in Paris the prefect of police – can close a discotheque for a maximum period of three months if the public order, security, or peace is disturbed by activities taking place in the establishment.<sup>287</sup>

In both cases, the closure is an administrative police measure<sup>288</sup>, which may only be imposed after the person concerned has been afforded the opportunity to present evidence in writing, or when appropriate and upon request, orally. He has the right to be assisted by a lawyer or to be represented by a proxy of his choice. In addition, the prefect must notify the person concerned in writing of the legal and factual grounds underlying the closure decision (*supra*, Section 5.2.2).<sup>289</sup>

283 See Article 1 Act n° 79-587 of 11 July 1979 and Article 24 Act n° 2000-321 of 12 April 2000.

284 Ribière, nrs. 183-185.

285 Article L. 3332-15, 6° Code de la santé publique.

286 Article L. 3332-15, 2° and 4° Code de la santé publique. For a list of examples of the application of this article, see Ribière, nrs. 192-193.

287 Article L. 333-1 Code de la sécurité intérieure.

288 Ribière, nrs. 186-187.

289 For the closure of a bar or restaurant, see Article L. 3332-15, 5° Code de la santé publique.

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## 6 THE ADMINISTRATIVE APPROACH IN GERMANY

*D. Van Daele*

### 6.1 INTRODUCTION

#### 6.1.1 *German administrative organisation*

The Federal Republic of Germany is a democratic and social federal state<sup>1</sup>, consisting of thirteen territorial states and three city states (Berlin, Bremen and Hamburg). As constituents of the Federation (*Bund*), these sixteen *Länder* are states with sovereign rights and responsibilities. Unless otherwise provided or permitted by the *Grundgesetz* (GG), the exercise of state powers and the discharge of state functions is a matter for the *Länder*.<sup>2</sup> This implies that the Federation has legislative and administrative powers only in those areas enumerated in the Basic Law.

With regard to the legislative power, article 70 (1) of the Basic Law stipulates that the *Länder* shall have the right to legislate as far as the Basic Law does not confer legislative power on the Federation. A distinction has to be made between two types of legislative power of the Federation. On the one hand, the Federation has exclusive legislative power with respect to the matters listed in article 73 of the Basic Law, e.g. foreign affairs; defence; financial matters; and cooperation between the Federation and the *Länder* concerning criminal police work and concerning the protection of the free democratic basic order and the constitution. In these matters, the *Länder* shall have power to legislate only when and to the extent that they are expressly authorised to do so by federal law.<sup>3</sup> On the other hand, article 74 of the Basic Law contains a long and extensive list of matters under concurrent legislative powers (e.g. civil law; criminal law; court organisation and procedure; labour law; and most aspects of the law relating to economic matters). In this respect, the *Länder* may only legislate as long as and to the extent that the Federation has not exercised its legislative power by enacting a law.<sup>4</sup> Given the fact that the Federation has regulated virtually all the matters listed in article 74 of the Basic Law, the system of concurrent legislative powers means in practice that the Federation has exclusive power. As a consequence, the

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1 Art. 20 (1) GG.

2 Art. 30 GG. Amendments to the Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in articles 1 and 20 of the Basic Law shall be inadmissible (art. 79 (3) GG).

3 Art. 71 GG.

4 Art. 72 (1) GG.

legislation of the *Länder* mainly concerns cultural matters, public order and municipal matters.<sup>5</sup>

This limited role of the *Länder* in the field of legislation contrasts with their extensive position in the field of administration.<sup>6</sup> Here, the fundamental rule of article 30 of the Basic Law – according to which the exercise of state functions is, in principle, a matter for the *Länder* – is of real significance.<sup>7</sup> Firstly, the *Länder* obviously execute their own legislation. Secondly, they shall in principle<sup>8</sup> also execute the federal laws as part of their own affairs.<sup>9</sup> In this perspective, the Federation merely disposes of restricted oversight competences (*Bundesaufsichtverwaltung*).<sup>10</sup> This implies that federal control is limited to subsequent supervision of the legality of administrative action.<sup>11</sup> Thirdly, the Basic Law contains a limited number of cases in which the *Länder* execute federal laws on federal commission and thus under close oversight of the Federation (*Bundesauftragsverwaltung*).<sup>12</sup>

Given this important role of the *Länder* in the execution of federal laws, the federal administration in Germany is rather limited. The Federation only executes its own laws through its own administrative authorities (*bundeseigene Verwaltung*) in matters listed in the articles 86 to 90 of the Basic Law. This includes for instance the federal tax department, the aviation administration or the federal border police. In comparison, the *Länder* have an extensive administrative apparatus. Although there are some differences between the various *Länder*, generally speaking the administrative organisation has a multilevel structure.<sup>13</sup>

The highest level, characterised by a smooth transition between governmental and administrative duties, consists of the supreme authorities (*oberste Landesbehörden*), such as the State Government (*Landesregierung*) and the ministerial departments. These principal authorities coordinate and guide the *Landesoberbehörden*, which are directly subordinated to a ministry and carry out special tasks for the whole territory of the State. An example of such a *Landesoberbehörde* is the State Criminal Police Office.<sup>14</sup> As a central agency, this *Landeskriminalamt* is responsible both for the criminal investigation of serious forms of crime and for the supervision and the support of the criminal investigation activities of the State's police stations.<sup>15</sup>

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5 Burkens & Van Schagen 2004, p. 342.

6 Heun 2011, p. 62.

7 Burkens & Van Schagen 2004, p. 342.

8 When the Basic Law does not otherwise provide or permit.

9 Art. 83 GG.

10 See art. 84 GG.

11 Heun 2011, p. 144.

12 See art. 85 GG.

13 Burkens & Van Schagen 2004, p. 342; Heun 2011, p. 63.

14 Schröder 2012, p. 49-50.

15 For an overview of the *Landeskriminalämter* in the sixteen *Länder*, see Mokros 2007, p. 50-65.

In some of the states, the intermediate authorities (*Landesmittelbehörden*) form the second level in the administrative organisation. They are subordinate to a supreme state authority and are only competent for a part of the state. At this intermediate level, the district or regional governments (*Bezirksregierungen*), headed by the *Regierungspräsident*, are the central actors.<sup>16</sup>

Finally, the lower state authorities (*untere Landesbehörden*) have jurisdiction only for a small part of the country. These are for example the chief executive of a county (*Landrat*) and the cities not belonging to a district (*kreisfreie Städte*). They are subordinated to an intermediate authority.<sup>17</sup> In this perspective, it needs to be considered that the municipalities are a part of the *Länder* and as a consequence are entrusted with supra-local tasks, which they exercise under the supervision and in accordance with the instructions of the state.<sup>18</sup> Hence, the municipal authorities are the most important administrative enforcers of federal and state laws.<sup>19</sup> However, they also have their own responsibilities. Article 28 (2) of the Basic Law stipulates that municipalities must be guaranteed the right to regulate all local affairs, within the limits prescribed by law.<sup>20</sup> This autonomy includes regulations in the form of by-laws. These are decided upon by democratically elected communal councils, and mainly concern cultural affairs, public infrastructure and the promotion and support of the local economy.<sup>21</sup>

#### 6.1.2 *The administrative approach to combating organised crime in the context of organised crime policy in Germany*

The German criminal political debate about organised crime and the ways to respond to this phenomenon originates from the second half of the 1980s and reached its peak in the last decade of the twentieth century. Partly due to the influence of European and international policies, organised crime and its containment became the predominant issue in German criminal policy during the 1990s. This resulted in important legislation that was enacted after intense and sometimes even controversial discussions in the political and academic sphere. The legislation relates first of all to issues of substantive criminal law, such as the introduction of the offence of money laundering into the German Criminal Code; the creation of new instruments for the confiscation of criminal assets; the widening of the scope of the statutory offence of participation in a criminal association; and the

16 Schröder 2012, p. 50.

17 Schröder 2012, p. 50.

18 Stein & Frank 2010, p. 133.

19 Heun 2011, p. 78.

20 Within the limits of their functions designated by law, associations of municipalities shall also have the right to self-government.

21 Heun 2011, p. 78-79.

extension of the definition of corruption. Secondly, a number of important legislative initiatives were taken to facilitate criminal investigations on organised crime. Reference can be made not only to the broadening of the scope of already existing instruments, such as the legislation on telephone tapping, but also to the introduction of statutory provisions on new investigatory powers, such as the electronic surveillance of private premises.<sup>22</sup>

Although the policy pursued so far almost exclusively focused on reforms of the substantive and procedural criminal law, attention was also paid to approaching organised crime via tax measures. This has led to a so-called multi-agency alliance of intervention in which public prosecutors, customs and the financial administration cooperate. The third section of the Money Laundering Control Act<sup>23</sup> provides that the tax authorities are informed about any relevant information gathered in the context of criminal investigations based on suspicion of money laundering. This information can be used for further fiscal investigations, even if the criminal suspicion was unsubstantiated. Conversely, the tax authorities pass information to the public prosecution service. Under certain conditions, such financial information can be used in criminal investigations. This approach, which can be interpreted as a move from confiscation through asset penalty towards forfeiture through taxation, shows that criminal law in Germany is to some extent no longer the only instrument in the fight against organised crime. Nevertheless, as Kilchling points out, it is partly unclear whether this development is limited to a kind of utilitarian use of taxation law for the tackling of organised crime or whether it can be seen as a broader tendency to 'escape' from criminal law and criminal prosecution.<sup>24</sup> The former seems to be the case. Indeed, to date, Germany's organised crime policy does not focus on the role of the (local) administrative authorities in preventing and combating this type of crime. As a consequence, Germany does not have a specific set of tools nor an institutional framework for an administrative approach to combating organised crime. As we will discuss in this report, this does not, however, imply that the administrative authorities cannot play a role in combating crime in general and organised crime in particular. In this respect, three issues are of particular relevance.

First of all, it should be pointed out that Germany has a long-standing tradition of administrative sanctions.<sup>25</sup> The *Ordnungswidrigkeitengesetz* (Administrative Offences Act) contains general regulations for all administrative offences according to federal and state laws.<sup>26</sup> It is very similar to the law governing criminal offences and was enacted in 1952. An *Ordnungswidrigkeit* is defined as an unlawful and reprehensible act, constituting the

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22 See Kilchling 2004, p. 717-762.

23 Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten (Geldwäschegesetz – GwG) of 13 August 2008.

24 Kilchling 2004, p. 735-736 and 754-755.

25 For a general analysis, see Dannecker 2013, p. 213-254.

26 The *Ordnungswidrigkeitengesetz* defines only some administrative offences. Most of these offences are scattered over a multitude of various laws and regulations.

factual elements set forth in a statute that enables the act to be sanctioned by an administrative fine.<sup>27</sup> While the *Ordnungswidrigkeitengesetz* only allows for fining natural persons and legal entities, there are several other laws allowing administrative authorities to impose other administrative sanctions. In this perspective the revocation and withdrawal of beneficial administrative acts (*infra*, Section 6.2) are particularly important.

Secondly, German legislation provides a number of mechanisms allowing administrative authorities to screen and monitor persons and legal entities (*infra*, Section 6.3). Although these mechanisms were not created to tackle organised crime, utilising them in this context can in a certain sense be seen as a form of what in the Netherlands is referred to by the broad concept of the administrative approach to combating organised crime. However, as we will discuss in Section 6.5 of this report, such an approach is only possible if administrative authorities obtain information, which allows them to make targeted and efficient use of their administrative means and powers.

Finally, both the police services and the *Ordnungsbehörden* are entrusted with the task of preventing and averting dangers for the public order and security (*Gefahrenabwehr*). In Section 6.4 of this report, we shall examine whether and to what extent instruments directed at preventing the disturbance of public order can be used against criminal groups.

## 6.2 ESSENTIAL CHARACTERISTICS OF GERMAN ADMINISTRATIVE PROCEDURE

### 6.2.1 *Verwaltungsverfahren and Verwaltungsakt*

From a general viewpoint the concept administrative procedure or administrative proceeding can be defined as a decision-making process carried out under the responsibility of a public law authority, which results in a decision with legally binding effect.<sup>28</sup> This definition must be seen in the perspective of the federal structure of Germany. Consequently, administrative competence is divided between the Federal Government and the Governments of the *Länder*.<sup>29</sup>

General administrative law at the federal level is codified in the *Verwaltungsverfahrensgesetz* (VwVfG)<sup>30</sup>, which defines the administrative procedure (*Verwaltungsverfahren*) as the activity of authorities having an external effect and directed to the examination of basic requirements, the preparation and the adoption of an administrative act.<sup>31</sup> Pursuant to § 35 VwVfG, an administrative act (*Verwaltungsakt*) shall be any order, decision or other

<sup>27</sup> § 1 (1) *Ordnungswidrigkeitengesetz* (OwiG).

<sup>28</sup> Röhl & Wollenschläger 2007, p. 199.

<sup>29</sup> Singh 2001, p. 33.

<sup>30</sup> Schröder 2012, p. 43.

<sup>31</sup> § 9 VwVfG.

sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect. This definition implies that an administrative act cannot contain a general abstract rule applicable to all citizens. In principle, an administrative act relates to an individual specific case.<sup>32</sup> There is an important exception to this fundamental rule: an administrative authority can indeed issue a so-called *Allgemeinverfügung*. Such a general order is an administrative act either directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a topic or its use by the public at large.<sup>33</sup>

An administrative act can only be performed by an authority (*Behörde*) performing functions of public administration.<sup>34</sup> In this perspective, the *Verwaltungsverfahrensgesetz* applies to the administrative activities under public law of the official bodies of the Federal Government and public law entities, institutions and foundations operated directly by the Federal Government.<sup>35</sup> With regard to the administrative activities under public law of the official bodies of the *Länder*<sup>36</sup>, the situation is more complex. In principle, the *Verwaltungsverfahrensgesetz* is applicable to these administrative activities in those cases where the *Länder* execute federal legislation on behalf of the federal authorities. Moreover, the *Verwaltungsverfahrensgesetz* applies when the *Länder* execute federal legislation within the exclusive or concurrent powers of the Federal Government. However, the *Verwaltungsverfahrensgesetz* shall only apply to the extent that no federal law or regulation contains similar or conflicting rules.<sup>37</sup> Furthermore, the *Verwaltungsverfahrensgesetz* shall not apply to the execution of federal law by the *Länder* when the administrative activity is regulated by legislation on administrative procedure of the *Länder*.<sup>38</sup> According to this so-called *Landessubsidaritätsklausel* the *Länder* have their own legislation on administrative procedure (*Verwaltungsverfahrensgesetze der Länder*). Nonetheless this legislation resembles the federal *Verwaltungsverfahrensgesetz* or even simply refers to it.<sup>39</sup>

Some proceedings are explicitly excluded from the scope of the *Verwaltungsverfahrensgesetz*. In the framework of this study it is important to bear in mind that this Act shall not apply to procedures of the federal or local tax authorities under the Fiscal Code (*Abgabenordnung*), nor to criminal and other prosecutions and the punishment of administrative offences (*Ordnungswidrigkeiten*).<sup>40</sup>

32 Kramer 2013, p. 35-36.

33 § 35 VwVfG. See Bader & Ronellenfitsch 2010, p. 299-310; Detterbeck 2013, p. 148-153; Knack & Henneke 2010, p. 746-750.

34 Schröder 2012, p. 56. See also § 1 (4) VwVfG.

35 § 1 (1) 1 VwVfG.

36 And local authorities and other public law entities subject to the supervision of the *Länder*.

37 § 1 (1) and (2) VwVfG.

38 § 1 (3) VwVfG.

39 Bader & Ronellenfitsch 2010, p. 14-16; Schröder 2012, p. 48.

40 See § 2 (2) VwVfG.

Finally, the *Verwaltungsverfahrensgesetz* covers only general administrative law, *i.e.* the rules, general principles and legal concepts applicable to all spheres of administrative activity. Apart from this *Allgemeines Verwaltungsrecht*, there is particular or specific legislation (*Besonderes Verwaltungsrecht*), dealing with the activities of the municipalities and other public authorities in domains as police, public security, public health and environmental protection.<sup>41</sup>

## 6.2.2 *The course of the administrative procedure*

### 6.2.2.1 **The commencement of proceedings**

Pursuant to § 10 VwVfG the administrative procedure shall not be tied to specific forms when no legal provisions exist which specifically govern this.<sup>42</sup> It shall be carried out in an uncomplicated, appropriate and timely manner. In that perspective, the administrative authority has to make its decision as soon as possible.<sup>43</sup>

The authority shall decide after due consideration whether and when it is appropriate to instigate administrative proceedings. However, this discretionary power does not apply in all cases. First of all, in some cases the authority is obliged by law to act *ex officio* or upon application. Secondly, legislation can stipulate that the authority may only act upon application.<sup>44</sup> Moreover, the discretionary power is not unlimited. When an authority is empowered to act at its discretion, it shall indeed do so in accordance with the purpose of the discretionary powers and has to respect the legal limits to those powers.<sup>45</sup>

### 6.2.2.2 **The administrative investigation**

By virtue of the *Untersuchungsgrundsatz* the administrative authority shall determine *ex officio* the facts of the case and the type and scope of investigation. The authority is not bound by the participants' submissions and motions to admit evidence.<sup>46</sup>

During the administrative procedure the authority must take all circumstances of the case into account, including those favourable to the participants.<sup>47</sup> Furthermore, § 24 (3) VwVfG explicitly stresses that the authority shall not refuse to accept statements or applications falling within its sphere of competence on the ground that it considers the statement or application inadmissible or unjustified.

41 Schröder 2012, p. 43.

42 The formal procedure, which is characterized by special procedural rules, is regulated in § 63 – § 71 VwVfG. It is applicable only in certain cases prescribed by the law.

43 Röhl & Wollenschläger 2007, p. 220.

44 § 22 VwVfG.

45 § 40 VwVfG.

46 § 24 (1) VwVfG.

47 § 24 (2) VwVfG.

As a general rule, the administrative authority shall utilise the evidence that, after due consideration, is deemed necessary to ascertain the facts of the case.<sup>48</sup> Given the principle of freedom of evidence and taking the proportionality principle into account, the authority can use all means of evidence it considers to be necessary to investigate the case.<sup>49</sup> The Administrative Procedure Act only contains a non-exhaustive list of the admissible means of evidence. In the first place the authority can gather information of all kinds. Secondly, the authority can hear participants, witnesses and experts or gather statements in writing or electronically from these persons. Furthermore the authority may obtain documents and records and is allowed to visit and inspect the locality involved.<sup>50</sup>

Notwithstanding the fact that the administrative authority determines the facts of the case *ex officio*, a duty exists for the participants in the administrative procedure to cooperate.<sup>51</sup> Paragraph 26 (2) VwVfG contains the obligation for the persons concerned to assist to ascertain the facts of the case and in particular to state facts and evidence known to them. A more extensive duty to assist in ascertaining the facts – and in particular the duty to appear in person or make a statement – does, however, only exist where the law specifically imposes such an obligation.<sup>52</sup>

Although the obligation to cooperate cannot be enforced, the participant in the administrative proceedings should be aware that non-compliance with this obligation can be taken into consideration by the administrative authority in the decision-making process.<sup>53</sup> It is indeed possible that the refusal to provide the necessary (personal) information leads to an unsatisfactory establishment of the facts of the case.<sup>54</sup> This can result in negative decision, for instance the denial of a license or a permit.

### 6.2.2.3 Due process in administrative proceedings

#### 6.2.2.3.1 *Hearing of participants*

According to § 25 (1) VwVfG the authority shall, when necessary, inform the participants in the administrative proceedings on their rights and duties. The right to be informed only relates to general aspects of the procedure and does not include a right to information about the facts of the on-going administrative investigation. This aspect should, however, be considered in conjunction with the right of the person to be heard, as provided for in

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48 § 26 (1) VwVfG.

49 Bader & Ronellenfitsch 2010, p. 189; Fehling, Kastner & Störmer 2013, p. 341-342.

50 See § 26 (1) VwVfG.

51 Bader & Ronellenfitsch 2010, p. 185; Detterbeck 2013, p. 365.

52 For a number of examples, see Bader & Ronellenfitsch 2010, p. 194-195. Furthermore also witnesses and experts can have a duty to cooperate. They are obliged to make a statement or furnish opinions when the law specifically requires this (see § 26 (3) VwVfG).

53 Bader & Ronellenfitsch 2010, p. 194.

54 Fehling, Kastner & Störmer 2013, p. 347; Knack & Henneke 2010, p. 502.



§ 28 (1) VwVfG. Before an administrative act which affects the rights of the person concerned may be issued, he must be given the opportunity to make a statement about the facts relevant to the decision. As such a statement requires knowledge of the facts of the case, the right to be heard includes a principal obligation of the authority to communicate these facts to the concerned person. Furthermore, the right to be heard also obliges the authority to thoroughly consider the statement of the person concerned and to deal with his arguments at the latest in the motivation of the decision.<sup>55</sup>

The right to be heard is not an absolute right. Pursuant to § 28 (3) VwVfG a hearing shall not take place where it conflicts with a compelling public interest. In addition § 28 (2) VwVfG stipulates that the hearing of a person may be omitted when this hearing is not required by the circumstances of the case. This is the case in the following situations in particular. First, a hearing is not compulsory when an immediate decision appears necessary in the public interest or when a delay would involve a risk.<sup>56</sup> Similarly, a hearing is not necessary when this would jeopardise a deadline vital to the decision.<sup>57</sup> Furthermore the person concerned does not need to be heard if the authority has not the intent to diverge, to his disadvantage, from the statements he has made.<sup>58</sup> Fourthly, the hearing may be omitted when the authority wishes to issue a general order (*Allgemeinverfügung*), similar administrative acts in considerable numbers or administrative acts using automatic equipment.<sup>59</sup> Finally, the hearing of a person is not necessary when measures of administrative enforcement (*Verwaltungsvollstreckung*) are to be taken.<sup>60</sup>

#### 6.2.2.3.2 Access to the file

Participants in administrative procedures have the right to examine the documents that are relevant for the procedure<sup>61</sup>, as far as knowledge of the contents is required to assert or defend their legal interests.<sup>62</sup> The decision of the administrative authority whether examination of the documents is required has to be reasonable. In that perspective, access to the file has to be granted if the person concerned argues that this is necessary for pursuing legally established purposes.<sup>63</sup> However, until administrative proceedings have been concluded, the right to access documents shall not apply to draft decisions and work directly connected with the preparation of decisions.<sup>64</sup>

<sup>55</sup> Röhl & Wollenschläger 2007, p. 222 and 232.

<sup>56</sup> § 28 (2) 1° VwVfG.

<sup>57</sup> § 28 (2) 2° VwVfG.

<sup>58</sup> § 28 (2) 3° VwVfG.

<sup>59</sup> § 28 (2) 4° VwVfG.

<sup>60</sup> § 28 (2) 5° VwVfG.

<sup>61</sup> Where participants are represented as provided under § 17 and § 18 VwVfG, only the representatives shall be entitled to inspect documents.

<sup>62</sup> § 29 (1) VwVfG.

<sup>63</sup> Fehling, Kastner & Störmer 2013, p. 378-379; Röhl & Wollenschläger 2007, p. 230.

<sup>64</sup> § 29 (1) VwVfG.

Although the right to examine documents is part of the fair trial principle in administrative proceedings<sup>65</sup>, this right adheres to limitations. The authority is not obliged to allow examination of documents when this would interfere with the orderly performance of its task. Moreover, access to the file can be refused in case disclosure of the contents would be disadvantageous to Germany as a whole or to one of its *Länder*. The refusal to access information is also possible if the proceedings are secret by law or by their very nature, based on the rightful interests of participants or third parties.<sup>66</sup>

#### 6.2.2.3.3 *Administrative secrecy*

Participants in the administrative procedure have the right to require that matters of a confidential nature – especially those relating to their private lives and business – shall not be revealed by the authority without their permission.<sup>67</sup> This should be seen in light of the right to informational self-determination and serves as a guarantee for the person that his private life or professional and company secrets will not be disclosed unauthorised. The non-disclosure obligation is not restricted to the authority that carries out the administrative procedure, but is extended to any other authority with knowledge of the concerned information.<sup>68</sup>

Although confidential matters in the sense of § 30 VwVfG refer to facts, situations and actions concerning the participant in the administrative procedure, the principle of administrative secrecy also applies to third parties<sup>69</sup>, such as the proxy or representative of the applicant, a family member of the applicant, a witness, an expert or an informant.<sup>70</sup>

#### 6.2.2.4 **The termination of proceedings**

The administrative procedure concludes when an administrative act is adopted. According to § 37 (1) and (2) VwVfG an administrative act may be issued in writing, electronically, verbally or another form<sup>71</sup> and must be sufficiently clearly defined in content. A written or electronic administrative act<sup>72</sup> needs to be accompanied by a statement of grounds, which must contain all relevant factual and legal grounds leading to the decision. With regard to discretionary decisions, the authority shall also indicate all aspects and points of

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65 Röhl & Wollenschläger 2007, p. 229.

66 § 29 (2) VwVfG. For a detailed analysis of the restrictions of the right to access the administrative file, see Bader & Ronellenfitsch 2010, p. 216-219; Knack & Henneke 2010, p. 549-554.

67 § 30 VwVfG.

68 Röhl & Wollenschläger 2007, p. 215-216.

69 Röhl & Wollenschläger 2007, p. 215.

70 Bader & Ronellenfitsch 2010, p. 226; Knack & Henneke 2010, p. 587.

71 A verbal administrative act must be confirmed in writing or electronically when there is justified interest that this should be done and the person affected requests this immediately. An electronic administrative act shall be confirmed in writing under the same conditions (§ 37 (2) VwVfG).

72 As well as an administrative act confirmed in writing or electronically.

view considered while exercising the powers of discretion.<sup>73</sup> A standard-form including a statement of grounds fitting all cases is not sufficient. However, the administration may refer to sources of information to which the person concerned has had access and which clarify the reasons for the decision. In particular, reference may be made to correspondence and to the oral hearings which preceded the decision.<sup>74</sup>

The duty to state grounds has exceptions.<sup>75</sup> First, no statement of grounds is required when the administration is granting an application or is acting upon a declaration and the administrative act does not infringe upon the rights of others. Second, there is no need for a motivation when the person for whom the administrative act is intended or who is affected by the act is acquainted with the opinion of the authority on the factual and legal positions and is able to comprehend it without motivation. In the third place no specific reasons must be given when the authority issues identical administrative acts in considerable numbers or with the help of automatic equipment, provided that the individual case does not merit a motivation. Finally, there is no duty to state grounds when this derives from a legal provision or when a general order is publicly promulgated.<sup>76</sup>

An administrative act shall be made known to the person for whom it is intended or who is affected by it.<sup>77</sup> This notification is a necessary condition for the validity of the administrative act.<sup>78</sup> As far as the *Verwaltungsverfahrensgesetz* does not provide otherwise, formal remedies for administrative acts are governed by the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*) and its implementing legislation.<sup>79</sup> A written or electronic administrative act susceptible to an appeal, must be accompanied by a statement in which the person concerned is informed about the possibility and terms of an appeal against this act.<sup>80</sup>

### 6.2.3 *Repeal of administrative acts*

#### 6.2.3.1 **Legal basis**

Pursuant to § 43 (2) VwVfG, an administrative act remains effective as long as it is not withdrawn, annulled, otherwise cancelled or expires. Basically, two methods of repeal of administrative acts exist: (a) the revocation (*Widerruf*), which is the repeal of a legally valid

73 § 39 (1) VwVfG.

74 Schwarze 2006, p. 1387-1388.

75 For a thorough analysis, see Bader & Ronellenfitsch 2010, p. 367-373; Fehling, Kastner & Störmer 2013, p. 550-553; Knack & Henneke 2010, p. 828-835.

76 See § 39 (2) VwVfG.

77 § 41 (1) VwVfG.

78 § 43 (1) VwVfG.

79 § 79 VwVfG.

80 See § 37 (6) VwVfG.

administrative act<sup>81</sup> and (b) the withdrawal (*Rücknahme*), i.e. the repeal of an unlawful administrative act<sup>82</sup>. The lawful or unlawful nature of an administrative act must be judged in light of the factual circumstances and the legal position applicable at the time of adoption of the act.<sup>83</sup> Consequently, a lawfully adopted administrative act will remain lawful even if the authority, resulting from changed legal or factual circumstances, would be no longer competent to issue it.<sup>84</sup>

In a number of cases, the withdrawal and the revocation of an administrative act on the basis of § 48 and § 49 VwVfG are to be considered administrative sanctions.<sup>85</sup> As we will see, a further distinction needs to be made between non-beneficial and beneficial administrative acts. Where the first category acts imposes burdens, the second category acts confers benefits. An administrative decision imposes burdens when it lays down duties or orders; when it prohibits certain actions; when it removes rights or changes them to the disadvantage of the beneficiary; or when it results either in other forms of legally relevant disadvantage or in the denial of legally relevant advantages.<sup>86</sup> The distinction between these two categories of administrative acts is not clear-cut. An administrative act can confer benefits on the addressee, but can also impose burdens on a third party at the same time. Apart from administrative acts with third-party effect, there are also administrative acts with dual effect. These include advantages as well as burdens for the addressee.<sup>87</sup>

Due to the subsidiarity principle<sup>88</sup>, paragraphs 48 and 49 of the *Verwaltungsverfahrensgesetz* are only applicable insofar as no federal law or regulation contains similar or conflicting provisions. As a consequence, these paragraphs are frequently replaced by special legal provisions, like for example § 15 of the *Gaststättengesetz* (*infra*, Section 6.3.1.2).<sup>89</sup>

### 6.2.3.2 Revocation of a lawful administrative act

The revocation of a lawful administrative act is usually applied when the factual and legal position on which the administrative act was based, has changed in such a way causing the content of the administrative act to be inconsistent with the applicable law.<sup>90</sup> With regard to the grounds of revocation, a distinction must be made between non-beneficial and beneficial administrative acts.

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81 See § 49 VwVfG.

82 See § 48 VwVfG.

83 Bader & Ronellenfitsch 2010, p. 531-532 and 562-563; Knack & Henneke 2010, p. 1079; Schwarze 2006, p. 888.

84 Detterbeck 2013, p. 222.

85 Dannecker 2013, p. 234.

86 Schwarze 2006, p. 891-892. See also Bader & Ronellenfitsch 2010, p. 568; Schmieszek 2009, p. 331.

87 Schwarze 2006, p. 888.

88 § 1 VwVfG.

89 Dannecker 2013, p. 234; Kramer 2013, p. 142. For an overview of these special legal provisions, see Bader & Ronellenfitsch 2010, p. 526-529 and 564-566.

90 Dannecker 2013, p. 235.

#### 6.2.3.2.1 *Grounds for revocation of non-beneficial administrative acts*

Acting within his discretionary power, the competent authority may revoke a lawful, non-beneficial administrative act without restrictions.<sup>91</sup> According to § 49 (1) VwVfG there are two exceptions to this general rule. Firstly, revocation is not possible if the relevant authority would be obliged to issue an administrative act with the same content. Secondly, revocation can be not allowed for other reasons, for instance when the authority has promised to a third party not to revoke the administrative act.<sup>92</sup>

#### 6.2.3.2.2 *Grounds for revocation of beneficial administrative acts*

In the light of the principle of compliance with statutory law and the principle of protection of legitimate expectations, lawfully adopted beneficial administrative decisions cannot be revoked. As a general rule priority will be given to protecting the interest of the addressee.<sup>93</sup> However, in a limited number of cases the possibility to revoke such administrative acts is accepted in the general interest. In that perspective § 49 (2) VwVfG is a remedial sanction provision<sup>94</sup>, containing an exhaustive list of grounds for revocation of beneficial administrative acts.

First, a lawful, beneficial administrative act may be revoked when law permits this.<sup>95</sup> Therefore, any legal rule having general effect – such as legislation, but also statutory regulations and by-laws – can open the possibility for revocation.<sup>96</sup> Although administrative provisions cannot constitute a legal basis for the revocation of an administrative act<sup>97</sup>, revocation is nevertheless permissible when the right to do so is reserved in the administrative act itself.<sup>98</sup> An administrative act can, after due consideration, be issued with such a revocation clause.<sup>99</sup> In that case, the principle of protection of legitimate expectations poses no problem, since the citizen is ruled to be aware of the clause and must take the possibility of revocation of the administrative act into account.<sup>100</sup> Nevertheless, the mere existence of a revocation clause is not sufficient alone to revoke an act. This is only permissible if objective reasons exist.<sup>101</sup>

91 See Bader & Ronellenfitsch 2010, p. 566-567; Knack & Henneke 2010, p. 1082-1084; Schwarze 2006, p. 888-889.

92 Schwarze 2006, p. 889.

93 Schwarze 2006, p. 889.

94 Dannecker 2013, p. 235.

95 § 49 (2) 1° VwVfG.

96 Bader & Ronellenfitsch 2010, p. 571; Detterbeck 2013, p. 239; Schwarze 2006, p. 889.

97 Schwarze 2006, p. 889.

98 § 49 (2) 1 VwVfG. See Knack & Henneke 2010, p. 1086-1087.

99 § 36 (2) 3° VwVfG.

100 Schwarze 2006, p. 889-890.

101 Detterbeck 2013, p. 239.

Secondly, an administrative act may be combined with an obligation, *i.e.* a stipulation requiring the beneficiary to perform, suffer or cease a certain action.<sup>102</sup> If the beneficiary of a lawfully adopted administrative decision does not comply with this obligation, the administrative decision may be revoked.<sup>103</sup> In that case a legally obtained advantage – such as a subsidy – is annulled as a result of the failure of the beneficiary to comply with the attached obligation(s).<sup>104</sup> Although it is irrelevant whether the beneficiary was at fault<sup>105</sup>, the proportionality principle may in certain circumstances prevent revocation of the administrative act. This can occur if the obligation was only a minor factor in relation to the benefits conferred.<sup>106</sup> In such cases the proportionality principle implies that the competent authority must first warn the person concerned to comply with his obligation. If he does not take the necessary measures, the administrative act can be revoked. Thus, the revocation of the act is to be considered as the *ultima ratio*.<sup>107</sup>

Furthermore the authority has the right to revoke a lawful beneficial administrative act when it would be entitled, as a result of a subsequent change in circumstances, not to issue this act.<sup>108</sup> This third ground for revocation is the most commonly used one.<sup>109</sup> New circumstances may relate to considerations that are internal or external to the act.<sup>110</sup> Such a circumstance can be a change in behaviour of the addressee of the administrative act.<sup>111</sup> However, it should be stressed that revocation is only allowed if failure to revoke the act would be contrary to the public interest.<sup>112</sup> Hence, the act can only be revoked if this is necessary in order to remove or prevent a direct threat to the state, the public interest or important community interests.<sup>113</sup>

In the fourth place revocation is also permissible when the authority would be entitled not to issue the administrative act, as a result of amendments to a legal provision, including legislation, but also statutory regulations and by-laws.<sup>114</sup> Two additional conditions have to be fulfilled. Firstly, it is required that the beneficiary did not use the benefit or has not yet received any benefits. Secondly, a revocation of the administrative act is only allowed when failure to revoke would be contrary to the public interest.<sup>115</sup>

102 § 36 (2) 4° VwVfG.

103 § 49 (2) 2° VwVfG.

104 Dannecker 2013, p. 235.

105 Bader & Ronellenfitsch 2010, p. 573.

106 Knack & Henneke 2010, p. 1088; Schwarze 2006, p. 890.

107 Bader & Ronellenfitsch 2010, p. 573-574; Detterbeck 2013, p. 240.

108 § 49 (2) 3° VwVfG.

109 Bader & Ronellenfitsch 2010, p. 574.

110 Schwarze 2006, p. 890.

111 Bader & Ronellenfitsch 2010, p. 574; Knack & Henneke 2010, p. 1088.

112 § 49 (2) 3° VwVfG.

113 Schwarze 2006, p. 890.

114 Bader & Ronellenfitsch 2010, p. 577; Knack & Henneke 2010, p. 1090.

115 § 49 (2) 4° VwVfG.

Finally a lawful beneficial administrative act can be revoked to prevent or eliminate serious harm to the common good.<sup>116</sup> In assessing this condition the case law of the *Bundesverfassungsgericht* relating to the concept of major public interests in cases involving a possible restriction of the freedom to exercise one's profession might serve as a guideline.<sup>117</sup> It should be noted that this ground for revocation is to be considered a so-called *Notstandsklausel*, i.e. emergency clause, which has to be interpreted restrictively and may only be used in exceptional cases.<sup>118</sup>

### 6.2.3.3 Withdrawal of an unlawful administrative act

#### 6.2.3.3.1 Grounds for withdrawal of non-beneficial administrative acts

It follows from § 48 (1) VwVfG that the withdrawal of an unlawful non-beneficial administrative act is subject to the principle of the freedom to withdraw. This means that such an administrative act may be withdrawn at all times.<sup>119</sup> Since the sole effect of such an act is to impose burdens, the withdrawal is deemed to not disadvantage the person concerned.

#### 6.2.3.3.2 Grounds for withdrawal of beneficial administrative acts

The withdrawal of an unlawful beneficial administrative act is a measure that is remedial in nature and serves to restore the legal order.<sup>120</sup> An administrative act which gives rise to a right or an advantage relevant in legal proceedings or which confirms such a right or advantage may only be withdrawn when subject to the restrictions determined in § 48 (2), (3) and (4) VwVfG.<sup>121</sup> In this context a distinction has to be made between administrative acts involving a payment and other beneficial administrative acts.

##### 6.2.3.3.2.1 Administrative acts involving a payment

An unlawful administrative act providing for a single or continuing financial payment or a divisible material benefit may not be withdrawn when the beneficiary relied upon this act and his reliance, weighed against the public interest, deserves protection. Legitimate expectations of the beneficiary are in general worthy of protection if he has utilised the contributions made or has made financial arrangements which he can no longer cancel, or can only cancel by suffering a disadvantage which reasonably cannot be asked of him.<sup>122</sup>

116 § 49 (2) 5° VwVfG.

117 Bader & Ronellenfitsch 2010, p. 578; Schwarze 2006, p. 890-891.

118 Detterbeck 2013, p. 242.

119 Ipsen 2005, p. 209; Knack & Henneke 2010, p. 1038 and 1040-1041; Schwarze 2006, p. 891.

120 Dannecker 2013, p. 235.

121 § 48 (1) VwVfG.

122 § 48 (2) VwVfG.

However, the legitimate expectation of the beneficiary cannot always justify upholding an unlawful beneficial administrative act. Three exceptions are defined in § 48 (2) VwVfG.<sup>123</sup> Firstly, the beneficiary cannot claim to have legitimate expectations when he obtained the administrative act by false pretences, threat or bribery. Secondly, the administrative act can be withdrawn if the beneficiary obtained it by giving information which was substantially incorrect or incomplete. Thirdly, the beneficiary cannot claim legitimate expectations if he either was aware of the illegality of the administrative act or was unaware of it due to gross negligence. In these three cases the unlawful administrative act involving a payment may be withdrawn. In general this withdrawal will have retrospective effect.<sup>124</sup> As a consequence, already made payments need to be returned.<sup>125</sup>

A person who makes incorrect or incomplete statements about facts relevant for granting a subsidy, to a public authority competent to approve a subsidy or to another agency or person which is involved in the subsidy procedure, commits the criminal offence of subsidy fraud under § 264 of the *Strafgesetzbuch* (StGB). Similarly, withholding information on facts relevant to the subsidy from the subsidy giver is a criminal offence. Furthermore, the use of a certificate of subsidy entitlement, which was acquired through incorrect or incomplete statements in subsidy proceedings, is qualified as subsidy fraud. Paragraph 264 StGB should be read in conjunction with the Subsidies Act<sup>126</sup>, which obliges the subsidy provider to indicate the facts relevant for granting the subsidy to the applicant.<sup>127</sup> Conversely, the applicant has the obligation to inform the subsidy giver without delay about all the facts forming an obstacle for granting a subsidy.<sup>128</sup>

#### 6.2.3.3.2.2 Other beneficial administrative acts

Unlawful administrative acts not involving financial payments may be withdrawn under § 48 (3) VwVfG. This means that the legitimate expectations of the beneficiary are not protected by the continuation of the administrative act.<sup>129</sup> However, in these cases the authority can be obliged to pay compensations for material losses incurred (*infra*, Section 6.2.3.6).

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123 See Bader & Ronellenfitsch 2010, p. 540-543; Fehling, Kastner & Störmer 2013, p. 662-664; Knack & Henneke 2010, p. 1062-1065.

124 § 48 (2) *in fine* VwVfG.

125 Schwarze 2006, p. 893.

126 Gesetz gegen missbräuchliche Inanspruchnahme von Subventionen (Subventionsgesetz – SubvG) of 29 July 1976.

127 § 2 (1) SubvG.

128 § 3 (1) SubvG.

129 Schwarze 2006, p. 894.



#### 6.2.3.4 Procedural deadlines

A lawful administrative act may be revoked even after the timeframe for appeal has lapsed.<sup>130</sup> Since the revocation of a lawful, non-beneficial administrative act is not subject to any restrictions in time<sup>131</sup>, revocation is possible at any time. On the contrary, a lawful beneficial administrative decision can only be revoked within one year from the date the authority in question discovers the facts justifying the revocation.<sup>132</sup> This period puts a time-limit on the decision, not on processing.<sup>133</sup>

Similarly, unlawful administrative acts can be withdrawn even after they have become non-appealable.<sup>134</sup> Whereas unlawful administrative decisions imposing burdens may at all times be set aside<sup>135</sup>, the withdrawal of unlawful beneficial administrative acts is subject to the aforementioned time limit of one year. However, this restriction does not apply if an administrative act which provides for a financial payment was obtained by false pretences, threat or bribery. Such an unlawful beneficial administrative act may be withdrawn at all times.<sup>136</sup>

#### 6.2.3.5 Effects of revocation and withdrawal

A lawful administrative act can be revoked wholly or partly.<sup>137</sup> The same goes for the withdrawal of an unlawful administrative act.<sup>138</sup> Whereas an unlawful administrative act may be withdrawn either retrospectively or with future effect<sup>139</sup>, a revocation has in principle only effect for the future.<sup>140</sup> The revoked act shall become null and void when the revocation comes into force, except when another date is dictated by the authority.<sup>141</sup>

Although in principle a retrospective revocation of an administrative act is excluded, one important exception exists to this fundamental rule. A lawful administrative act which provides for a single or continuing financial payment may indeed not only be revoked for the future but also with retrospective effect. However, such a retroactivity of the revocation is only allowed in two cases. In the first place a retrospective revocation is possible when

130 § 49 (1) and (2) VwVfG. Once the administrative act has become non-appealable, the decision to revoke it shall be taken by the authority competent under § 3 of the *Verwaltungsverfahrensgesetz*. This also applies when the administrative act has been issued by another authority (§49 (5) VwVfG).

131 Bader & Ronellenfitch 2010, p. 569; Knack & Henneke 2010, p. 1080.

132 § 49 (2) jo. § 48 (4) VwVfG.

133 Dannecker 2013, p. 237.

134 § 48 (1) VwVfG. Once the administrative act has become non-appealable, the decision to withdraw it shall be taken by the authority competent under § 3 of the *Verwaltungsverfahrensgesetz*. This also applies when the administrative act has been issued by another authority (§48 (5) VwVfG).

135 Schwarze 2006, p. 891-892.

136 § 48 (2) and (4) VwVfG.

137 § 49 (1) and (2) VwVfG.

138 § 48 (1) VwVfG.

139 § 48 (1) VwVfG.

140 § 49 (1) and (2) VwVfG.

141 § 49 (4) VwVfG.

the payment is not used for the purpose for which it was intended in the administrative act.<sup>142</sup> Secondly, a retrospective revocation of the administrative act is permissible if the act prescribed an obligation to which the beneficiary either failed to comply with or did not comply with during the stipulated period.<sup>143</sup> This ground for revocation is of particular importance in cases concerning subsidies.<sup>144</sup>

Where an administrative act is withdrawn or revoked with retrospective effect, the person concerned – e.g. the applicant for subsidies – shall have to return any payments or contributions which have already been made. The amount of such a reimbursement shall be stipulated in a written administrative act.<sup>145</sup>

#### 6.2.3.6 Compensation

If a beneficial administrative act was revoked on one of the grounds provided for in § 49 (2) 3°, 4° and 5° VwVfG (*supra*, Section 6.2.3.2.2), the person affected can claim compensation for damages. Upon application the authority shall reimburse the person concerned based on his reliance on the continued existence of the administrative act. This applies, however, only to the extent that this reliance merits protection.<sup>146</sup>

Moreover a compensation for suffered material losses is granted in case of withdrawal of an unlawful administrative act not involving financial payments. The obligation to pay damages follows only where the legitimate expectation gives rise to protection. This question is subject to the same principles as those which apply to administrative acts covered by § 48 (2) VwVfG (*supra*, Section 6.2.3.3.2.1).<sup>147</sup>

In both cases the financial disadvantage shall be reimbursed to an amount that not exceeds the interest of the affected person. The authority determines the financial damages. A claim for compensation may only be made within a year. This period shall commence as soon as the authority has informed the affected person.<sup>148</sup>

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142 § 49 (3) 1° VwVfG.

143 § 49 (3) 2° VwVfG.

144 Detterbeck 2013, p. 242; Kramer 2013, p. 142.

145 § 49a (1) VwVfG. For a detailed analysis, see Bader & Ronellenfitsch 2010, p. 589-595; Detterbeck 2013, p. 243-245; Knack & Henneke 2010, p. 1100-1110; Schmieszek 2009, p. 346-348.

146 § 49 (6) VwVfG. For a detailed analysis, see Bader & Ronellenfitsch 2010, p. 584-586; Knack & Henneke 2010, p. 1097-1099.

147 § 48 (3) VwVfG. See also Schwarze 2006, p. 894.

148 § 49 (6) jo. § 48 (3) VwVfG.

### 6.3 INSTRUMENTS TO SCREEN AND MONITOR PERSONS AND LEGAL ENTITIES

#### 6.3.1 *Screening and monitoring on the basis of sector-specific laws*

##### 6.3.1.1 Trade regulation act

###### 6.3.1.1.1 *Freedom of trade*

According to article 12 (1) of the Basic Law all Germans have the right to freely choose their occupation or profession. However, this fundamental principle of occupational freedom does not preclude that the practice of an occupation or profession can be regulated by or pursuant to a law. In that perspective every natural person or legal entity<sup>149</sup> may practice a trade or set up a business, as far as the Trade Regulation Act (*Gewerbeordnung*) does not prescribe or allow exceptions or limitations to the freedom of trade.<sup>150</sup>

By virtue of § 14 (1) GewO the commencement of a fixed location business (*stehenden Gewerbes*) has to be notified to the competent administrative authority, who registers the business activity. Similarly, a change to a business and the setting up of a branch office or a dependent local office are registered. A trade or *Gewerbe* is defined as every activity that a person performs in self-employment, on his own account, in his own name and on a permanent basis. Although this activity has to be profit oriented, it is not relevant whether or not a profit is actually made. Furthermore only activities not harmful to society can be qualified as a trade.<sup>151</sup>

The data supplied will be stored in the *Gewerberegister*, which is managed by the municipal administration and enables the competent local trade office to carry out inspections and surveys. Given the fact that the respective local trade registers are not connected with each other<sup>152</sup>, the monitoring of trades and businesses is mainly a local issue.<sup>153</sup> Nevertheless, the competent trade office automatically sends a copy of the business registration to the responsible tax office.<sup>154</sup> In addition, data from the *Gewerberegister* can under certain conditions be transmitted to other relevant institutions, such as the Federal Employment Agency, the Employer's Liability Insurance Association and the Chamber of Industry and Commerce.<sup>155</sup>

149 Pewestorf, Söllner & Tölle 2013, p. 596.

150 § 1 (1) GewO.

151 See Frotscher & Kramer 2013, p. 146-151; Ruthig & Storr 2011, p. 117-125; Stober & Eisenmenger 2011, p. 15-21.

152 Stober & Eisenmenger 2011, p. 34-35.

153 Frotscher & Kramer 2013, p. 152-153; Stober & Eisenmenger 2011, p. 12.

154 See § 138 Abgabenordnung.

155 See § 14 (8) GewO.

#### 6.3.1.1.2 License requirements and inspection

The *Gewerbeordnung* contains two important exceptions to the general rule of freedom of trade. Firstly, there are trades requiring a license, which means that some business activities are only allowed on the condition that the competent administrative authority has issued an authorisation (*Genehmigung*) or a permit (*Erlaubnis*). This is, for instance, the case for variety shows (display of persons on stage, including peepshows<sup>156</sup>)<sup>157</sup>, gaming houses<sup>158</sup> and gaming machines for use by the public<sup>159</sup>, auctions<sup>160</sup>, and real estate agents, builders and building supervisors<sup>161</sup>. A licence for these trades will only be granted if the applicant provides evidence of his personal reliability, his professional skills and – where necessary – his financial capacity.

Secondly, there are trades that can be practiced without a licence, but are subjected to special inspections on the basis of § 38 GewO. These *besonders überwachungsbedürftige Gewerbe* include, amongst others, the purchase and sale of a whole list of goods<sup>162</sup> by companies specialised in trading with second hand goods, the provision of information on financial circumstances and personal matters (credit agencies and detective agencies) and the sale and installation of building security measures including lock and key services. Only persons that can prove they are particularly reliable can perform these types of activities. The competent administrative authority will check the reliability of the person concerned immediately after the notification of the commencement of the business. For this purpose, the trader has to present without delay a Certificate of Good Conduct (*Führungszeugnis*) and an excerpt from the Central Trade Register (*Gewerbezentralregister*). If he does not fulfill this obligation, the administrative authority will obtain this information *ex officio*.<sup>163</sup> Alongside these documents, the administrative authority can ask the trader to provide additional documents which are appropriate to prove his personal reliability. Given the duty for the participant in the administrative procedure to cooperate (*supra*, Section 6.2.2.2), the trader will be obliged to present these documents.

Traders requiring a license or practicing a trade subjected to inspection must, upon request, provide the competent administrative authority with oral and written information necessary for the monitoring of their business operations.<sup>164</sup> During the normal business hours officials of the administrative authority are furthermore empowered to enter and inspect the business premises and check the business documents. Outside the normal

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156 Sailer 2007b, p. 209.

157 § 33a GewO.

158 § 33i GewO.

159 § 33c GewO.

160 § 34b GewO.

161 § 34c GewO.

162 Such as motor vehicles, precious metals, precious stones, pearls and jewelry and scrap metal.

163 § 38 (1) GewO. See Stober & Eisenmenger 2011, p. 83-85.

164 § 29 (1) GewO. See Stober & Eisenmenger 2011, p. 51.

business hours, business premises can only be entered during the day and on the condition that this is necessary to prevent urgent threats to public safety or order.<sup>165</sup>

If a trade is practiced without the required license, the competent administrative authority is entitled to prevent the continuation of the enterprise.<sup>166</sup> In this respect, the authority can order the closure of the business premises.<sup>167</sup>

#### 6.3.1.1.3 *Prohibition to practice a trade due to unreliability*

Based on § 35 (1) GewO the competent<sup>168</sup> administrative authority may prohibit the practice of a trade in whole or in part. This provision is mainly of importance for those trades that can be exercised without an authorisation or a permit. With regard to trades requiring an authorisation or a permit, the specific legislation usually provides the possibility to withdraw or revoke the authorisation or permit based on the unreliability of the trader.<sup>169</sup> In that case § 35 (1) GewO does not apply.<sup>170</sup>

Given the far-reaching nature of the prohibition to practice a trade due to unreliability, strict conditions must be fulfilled. First of all, a prohibition is only possible in cases where there are facts demonstrating the unreliability of either the trader or a person entrusted with the management of the business.<sup>171</sup> Important examples are the conviction for a criminal offence which is connected to the running of the business; the non-fulfilment of tax and social insurance obligations, for instance in the case of illegal employment; and the fact that the person concerned has not paid invoices repeatedly due to economic inability.<sup>172</sup> Secondly, the prohibition to practice a trade must be a necessary measure to protect the general public or the employees in the company.<sup>173</sup> This condition implies that the trade must be practiced in such a way that important rights or legally protected interests are potentially endangered.<sup>174</sup> In the third place it follows from the proportionality principle that milder measures – e.g. a warning or the imposition of requirements – should be taken into account before prohibiting the practice of a trade.<sup>175</sup> In that perspective the adminis-

165 § 29 (2) GewO.

166 § 15 (2) GewO.

167 Sailer 2007b, p. 210.

168 See § 35 (7) GewO.

169 Frotscher & Kramer 2013, p. 156; Ruthig & Storr 2011, p. 149-150.

170 § 35 (8) GewO. See Stober & Eisenmenger 2011, p. 44.

171 § 35 (1) GewO.

172 Pewestorf, Söllner & Tölle 2013, p. 603-605. See also Frotscher & Kramer 2013, p. 159-160; Ruthig & Storr 2011, p. 132-139.

173 § 35 (1) GewO.

174 Pewestorf, Söllner & Tölle 2013, p. 605.

175 Pewestorf, Söllner & Tölle 2013, p. 605; Ruthig & Storr 2011, p. 153-154; Stober & Eisenmenger 2011, p. 48.

trative authority can allow, on request of the trader, the continuation of the business by a proxy<sup>176</sup> who guarantees the proper management of the business.<sup>177</sup>

The prohibition order (*Untersagungsverfügung*) can be limited to the practiced business, but can also be extended to other or even all businesses of the person.<sup>178</sup> This order shall be entered in the *Gewerbezentralregister* and applies to the whole territory of Germany. In order to prevent the continued exercise of the prohibited trade, the competent administrative authority can take the necessary measures of administrative enforcement (*Verwaltungsvollstreckung*). Taking account of the principle of proportionality, these measures can also include the closure of the business premises.<sup>179</sup>

The prohibition to trade due to unreliability may be revoked in case the trader demonstrates in a written request to the administrative authority that there are new facts justifying the assumption that he is reliable again. In principle, revocation is possible at any time. However, during the first year, the revocation of the *Untersagungsverfügung* can only be allowed for special reasons.<sup>180</sup>

#### 6.3.1.1.4 Prohibition to practice a trade due to disadvantages and dangers

The prohibition to practice a trade can not only be based on grounds relating to the unreliability of the person concerned, but is under certain conditions also possible in cases where this person is reliable. The competent administrative authority may indeed at all times prohibit the further use of any commercial plant if this is necessary given the predominant disadvantages and dangers for the public interest.<sup>181</sup> However, in case of such a so-called *Sachbezogene Untersagung*<sup>182</sup>, the person concerned has the right to receive a reimbursement for the losses incurred.<sup>183</sup>

#### 6.3.1.2 Law on public houses and restaurants (Licensing Act)

The law on public houses and restaurants was initially part of the *Gewerbeordnung*, but became a separate branch of trade law – the so-called *Gaststättenrecht* – in 1930<sup>184</sup>, with its own Licensing Act (*Gaststättengesetz*) containing specific regulations for bar services and restaurants.<sup>185</sup> As a consequence of the *Föderalismusreform 2006*, the legislative power with respect to the *Gaststätten* was transferred to the *Länder*, which means that the Feder-

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176 See § 45 GewO.

177 § 35 (2) GewO.

178 § 35 (1) GewO.

179 Frotscher & Kramer 2013, p. 157; Sailer 2007b, p. 210; Stober & Eisenmenger 2011, p. 50.

180 § 35 (6) GewO.

181 § 51 GewO.

182 Pewestorf, Söllner & Tölle 2013, p. 605.

183 § 51 GewO.

184 Knemeyer 2007, p. 302; Sailer 2007b, p. 205.

185 § 1 GastG.

ation can no longer regulate this matter.<sup>186</sup> Nevertheless, it is appropriate to briefly discuss the federal *Gaststättengesetz* of 5 May 1970. After all, this act is still into force in nine states that have not enacted legislation concerning public houses and restaurants yet.<sup>187</sup> Furthermore, the Licensing Acts of the other seven states are broadly in line with the federal *Gaststättengesetz*.<sup>188</sup>

As a general rule, the running of a pub or a restaurant requires a special license<sup>189</sup>, which can be limited to a certain period of time<sup>190</sup> and can be subject to conditions<sup>191</sup>. The licence has to be denied in the circumstances set out in § 4 of the *Gaststättengesetz*. In the framework of this study it is of particular importance that the competent administrative authority is obliged to refuse a license if facts justify the assumption that the applicant does not have the required reliability to run the business<sup>192</sup> or that he will exploit persons that are inexperienced or weak-minded. The license has also to be denied if facts justify the assumption that the applicant will encourage alcohol abuse, illegal gambling, handling of stolen goods or immorality. Furthermore, a licence will be refused when a person does not comply with the health or food laws or the laws concerning employment protection or protection of minors.<sup>193</sup>

Paragraph 15 of the *Gaststättengesetz* contains specific provisions relating to the withdrawal and the revocation of the license to run a pub or restaurant. The licence will be withdrawn if a ground for refusal was present when the licence was granted, but the administrative authority was unaware of this.<sup>194</sup> If one of the circumstances mentioned in § 4 of the *Gaststättengesetz* occur during the practice of the catering trade, the licence will be revoked.<sup>195</sup> In addition, revocation of the licence is possible – but not obliged – in the circumstances envisaged in § 15 (3) of the *Gaststättengesetz*. They include for instance the non-compliance with imposed conditions.

Running a pub or a restaurant without the required licence constitutes an administrative offence.<sup>196</sup> This rule applies both to cases where the licence was not obtained and to cases where an obtained licence was withdrawn or revoked.<sup>197</sup> In these circumstances, the com-

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186 Art. 74 (1) 11° GG.

187 Art. 125a (1) GG.

188 Frotscher & Kramer 2013, p. 215-216.

189 § 2 GastG. In Brandenburg and Thüringen, for example, the running of a pub or restaurant in principle no longer requires a license and only needs to be notified to the competent administrative authority (Pewestorf, Söllner & Tölle 2013, p. 607; Stober & Eisenmenger 2011, p. 99).

190 § 3 (1) *Gaststättengesetz*.

191 See § 5 *Gaststättengesetz*.

192 In particular if the applicant is an alcoholic.

193 § 4 (1) 1° *Gaststättengesetz*.

194 § 15 (1) *Gaststättengesetz*.

195 § 15 (2) *Gaststättengesetz*.

196 § 28 (1), 1° *Gaststättengesetz*.

197 Pewestorf, Söllner & Tölle 2013, p. 617; Ruthig & Storr 2011, p. 225.

petent administrative authority can take the necessary measures to prevent the continuation of the business enterprise.<sup>198</sup> The closure of the pub or the restaurant can thus be ordered.<sup>199</sup>

### 6.3.1.3 The regulation of prostitution

#### 6.3.1.3.1 *The situation before the Prostitution Act of 20 December 2001*

Although prostitution as such is since the 1973 reform of the “*Sexualstrafrecht*” no longer a criminal offence, it was regarded as an act contrary to public decency and morality.<sup>200</sup> As a consequence, prostitutes did not enjoy a specific legal status and conducted their activities in a legal grey area. Moreover, brothels, brothel-like establishments and other establishments which make a profit from providing sexual services did not fall within the scope of application of the *Gewerbeordnung*, which not only meant that such an establishment could not be registered as a trade or business, but also implied that trade inspections were not possible. In practice, the authorities qualified brothels and similar establishments as “the letting of rooms on a commercial basis” and hence often tolerated the activities of the brothel keepers.<sup>201</sup>

The situation was somewhat different for restaurants, pubs and bars falling under the scope of the *Gaststättengesetz*. A proprietor who provided conditions facilitating sexual intercourse between prostitutes and clients in his restaurant, pub or bar was indeed qualified as unreliable because he was encouraging immoral conduct. Thus, pursuant to § 4 of the *Gaststättengesetz* a licence could be denied. According to the administrative praxis and the case law of the administrative courts, proprietors could however prevent the refusal of a licence if they kept the rooms of their restaurant, pub or bar strictly separate from that part of the building in which sexual services were initiated and performed.<sup>202</sup>

#### 6.3.1.3.2 *The current regime*

The Act of 20 December 2001 regulating the legal situation of prostitution<sup>203</sup> has, to a large extent, made an end to the former ambivalent approach. The legislator decided against the immorality of prostitution. Henceforth, prostitution is an occupation or profession which is protected under the principle of occupational freedom, set out in article 12 of the Basic Law. Although prostitution is not a profession like any other, the principle of free self-determination implies that a person’s voluntary and autonomous decision to engage

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198 § 31 *Gaststättengesetz* *juncto* § 15 (2) *GewO*.

199 Ruthig & Storr 2011, p. 225-226; Stober & Eisenmenger 2011, p. 52-53 and 103.

200 Stühler 1997, p. 861.

201 Federal Ministry For Family Affairs Senior Citizens Women And Youth 2007, p. 65-66.

202 Caspar 2002, p. 1322-1324; Stühler 1997, p. 862-863. See also Federal Ministry For Family Affairs Senior Citizens Women And Youth 2007, p. 66.

203 Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten (*Prostitutionsgesetz*) of 20 December 2001.



in prostitution must be respected, as long as it does not violate any rights of others.<sup>204</sup> In that perspective, the legal relationship between the prostitute and the client is regulated as a contract with unilateral obligations. Prostitutes thus have the right to claim payment of the agreed remuneration. Furthermore, they will also have an enforceable claim if they make themselves available for a certain period of time to render their services.<sup>205</sup> This claim is based on the fact that an agreement between a prostitute and a brothel keeper – in particular in the context of an employment relationship – constitutes a contract with unilateral obligations. Given the unilateral character, clients or brother operators do not have an enforceable claim to the performance of (specific) sexual services based on any agreement with the prostitute.<sup>206</sup>

The legislator paid no attention to regulations applying to prostitution establishments. This explains why the Prostitution Act did not change the *Gewerbeordnung* or the *Gaststättengesetz*. Nonetheless, it seems to be broadly accepted that the legislator intended that the change in attitude towards prostitution should impact the legal system.<sup>207</sup> This means that the Prostitution Act has an indirect effect – *Ausstrahlungswirkung*<sup>208</sup> – on trade and licensing law. As a result, brothel keepers must be recognised as persons engaged in a trade or business and need to register their trade under the *Gewerbeordnung*.<sup>209</sup> Moreover, the restrictions for restaurants, pubs or bars no longer apply. The mere finding that such an establishment initiates contacts between prostitutes and clients is no longer a sufficient ground for the denial, revocation or withdrawal of a trade licence in accordance with § 4 (1) and § 15 of the *Gaststättengesetz*.<sup>210</sup> In the so-called “Swinger club judgement” of 6 November 2002, the *Bundesverwaltungsgericht* ruled that the goal of § 4 (1) of the *Gaststättengesetz* is not to promote morality as such. The scope of application of this provision is limited to those matters which go against generally accepted attitudes, which are prohibited by the criminal law or which are due to their public nature seen as ethically degrading.<sup>211</sup>

204 Federal Ministry For Family Affairs Senior Citizens Women And Youth 2007, p. 9 and 11.

205 § 1 Prostitutionsgesetz.

206 See Federal Ministry For Family Affairs Senior Citizens Women And Youth 2007, p. 13-16.

207 Federal Ministry For Family Affairs Senior Citizens Women And Youth 2007, p. 15 and 65.

208 Stober & Eisenmenger 2011, p. 17.

209 Federal Ministry For Family Affairs Senior Citizens Women And Youth 2007, p. 67.

210 Caspar 2002, p. 1324-1326; Frotscher & Kramer 2013, p. 172; Stober & Eisenmenger 2011, p. 104-105. See also Federal Ministry For Family Affairs Senior Citizens Women And Youth 2007, p. 67.

211 BVerwG, Judgement of 6 November 2002, NVwZ 2003, p. 603.

Nonetheless, if the brothel poses the risk that prostitutes have to carry out their work against their will<sup>212</sup> or in other unacceptable circumstances<sup>213</sup>, a prohibition pursuant to § 35 of the *Gewerbeordnung* can be imposed (*supra*, Section 6.3.1.1.3). Similarly, a licence for a restaurant, pub or bar is to be denied, revoked or withdrawn if the operation of this establishment poses such a risk. Furthermore, causing a nuisance to guests and residents can in specific cases justify the imposing of conditions or even the revocation of the licence. The same goes if the protection of young people<sup>214</sup> is placed at risk.<sup>215</sup> It should be noted, however, that the parliamentary debate on the regulation of prostitution did not focus on the question whether the administrative authorities should dispose of additional and specific mechanisms for monitoring prostitution establishments. In this respect, a distinction must be made between the responsibilities of the *Länder*, which have the exclusive competence for licensing law, and the possibility at the federal level to take legislative measures in order to enhance the control and the monitoring of brothels and other commercial businesses whose purpose is to generate income from the offering of sexual services.<sup>216</sup>

Finally, article 297 of the Act Introducing the Criminal Code<sup>217</sup> authorises state governments to prohibit prostitution – in all its forms<sup>218</sup> – across either an entire municipality or parts of a municipality for the protection of young persons or public decency. In addition, prostitution can entirely or at certain times of the day be prohibited along public roads, paths, in squares, parks and other visible locations. Although most of the *Länder* have made use of this possibility to zone off areas in which prostitution is not permitted, in practice it has proven difficult to prevent prostitution in this so-called *Sperrbezirke*. Admittedly, any person who violates a ban imposed by such an ordinance against pursuing

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212 In this regard, the *Bundesgerichtshof* ruled that § 181a (1), 2° of the Criminal Code has to be interpreted restrictively. If a prostitute is working voluntarily in a brothel or brothel-like establishment, the mere fact that she is integrated into an organisational structure by rules governing fixed working hours, place of work and prices does not constitute “determining” her work within the meaning of this provision. However, the brothel operator may not determine the nature and the extent of the prostitute’s work. The prostitute must have the right to terminate her employment relationship at any time, she must be permitted to refuse to perform sexual acts and may also not be subject to the employer’s right to issue directives to the effect that she must accept certain clients (see Federal Ministry For Family Affairs Senior Citizens Women And Youth 2007, p. 42-43).

213 Persons in charge of a prostitution establishment commit a criminal offence if they keep prostitutes personally and financially dependent on the operation (see § 180a (1) StGB). Furthermore, the promotion of prostitution on a commercial basis is punishable if the personal or financial independence of the prostitute is restricted (see § 181a (2) StGB).

214 With regard to prostitution likely to corrupt juveniles, see also § 184f of the Criminal Code.

215 Federal Ministry For Family Affairs Senior Citizens Women And Youth 2007, p. 67. See also Caspar 2002, p. 1326-1328; Ruthig & Storr 2011, p. 120-121 and 137.

216 Federal Ministry For Family Affairs Senior Citizens Women And Youth 2007, p. 48, 53, 59 and 68-70.

217 Einführungsgesetz zum Strafgesetzbuch (EGStGB) of 2 March 1974.

218 Götz 2013, p. 39. See also the decision of 28 April 2009 of the Federal Constitutional Court (*Bundesverfassungsgericht*): [http://www.bverfg.de/entscheidungen/rk20090428\\_1bvr022407.html](http://www.bverfg.de/entscheidungen/rk20090428_1bvr022407.html).

prostitution is considered to be committing an administrative offence.<sup>219</sup> In addition, persistently contravening such a prohibition constitutes a criminal offence.<sup>220</sup> However, the ordinances are often only selectively enforced, which probably explains why many prostitutes ignore the prohibitions.<sup>221</sup>

### 6.3.1.4 The regulation of gambling

#### 6.3.1.4.1 *The division of powers between Federation and Länder*

Taking into account the division of powers between the Federation and the states, German gambling law distinguishes two categories of gambling activities. The first category comprises sports betting, lotteries and traditional casino games. Since these activities are a potential threat to public order and security, the police laws of the *Länder* regulate them. The operation of gambling machines in amusement arcades (game halls), restaurants and pubs, in contrast, is considered as a commercial activity. Until the *Föderalismusreform 2006*, this second type of gambling activities was regulated in the *Gewerbeordnung* and – for the technical specifications – the Gambling Ordinance (*Spielverordnung*<sup>222</sup>).<sup>223</sup> Whereas the placement of gambling machines in pubs and restaurants is still subject to authorisation under § 33c of the federal *Gewerbeordnung*, the legislative power with regard to amusement arcades currently belongs to the *Länder*.<sup>224</sup> Yet, only Berlin enacted its own *Spielhallengesetz*<sup>225</sup>, therefore the amusement arcades in the other fifteen states are still regulated by the *Gewerbeordnung*.<sup>226</sup>

#### 6.3.1.4.2 *The regulation of casino gambling*

It follows from the above that the *Länder* are entitled to regulate casino gambling on their territory. In that perspective, the state laws on casinos (*Spielbankgesetze der Länder*) contain provisions regarding, among others, the licence required for the running of a casino, the types of games permitted, the player protection measures, the taxation of casino revenues and measures to prevent money laundering. In this way, the *Länder* can develop their own policies with regard to casino gambling. However, it should be noted that the *Länder* concluded the German Interstate Treaty on Gambling of 2008, with a view to a more comprehensive and to a certain extent unified framework for lotteries, casino games and

219 See § 120 *Ordnungswidrigkeitengesetz*.

220 § 184e StGB.

221 See Federal Ministry For Family Affairs Senior Citizens Women And Youth 2007, p. 72-74.

222 Verordnung über Spielgeräte und andere Spiele mit Gewinnmöglichkeit (*Spielverordnung* – *SpielV*) of 6 February 1962. See Peters 2011, p. 134-137.

223 Becker 2011, p. 195-196; Frotscher & Kramer 2013, p. 175-177.

224 Art. 74 (1) 11° GG. See Krappel 2013, p. 673-679.

225 Frotscher & Kramer 2013, p. 175, footnote 112.

226 Art. 125a (1) GG.

sports betting.<sup>227</sup> This Treaty is now replaced by the *Glücksspielstaatsvertrag* of 15 December 2011<sup>228</sup>, which entered into force on 1 July 2012.

The fundamental objectives of the *Glücksspielstaatsvertrag* are, *inter alia*, prevent and combat gambling addiction, restrict the offering of gambling services in the public interest, protect players against fraudulent practices and prevent and control gambling-associated crimes.<sup>229</sup> In order to achieve these objectives, the *Länder* must limit the number of casinos.<sup>230</sup> As a consequence, there are approximately seventy casinos in Germany, around half of which are owned by the state government and run by state-operated enterprises and the other half owned by a combination of state-licensed private and public companies.<sup>231</sup>

Pursuant to § 2 (2) and § 4 of the *Glücksspielstaatsvertrag*, a licence from the competent state authority is necessary to run a land-based casino.<sup>232</sup> Depending on the state, either the Ministry of the Interior or the Ministry of Finance acts as supervisory body.<sup>233</sup> The application for a licence will be rejected if the casino is considered as contrary to one of the indicated objectives of the *Glücksspielstaatsvertrag*. In this respect, the applicant has no legal right to obtain a licence. Moreover, applicants for a licence are obliged to submit a social-concept, in which they outline the intended measures to prevent the socially harmful effects of gambling.<sup>234</sup> Furthermore, casino licence holders have to comply with comprehensive anti-money laundering measures and are required to take player protection measures, which include strict registration and identification procedures. They can be held liable for losses if they fail to prevent vulnerable players from playing.<sup>235</sup> In order to protect players, a central database containing the personal data of barred players is set up.<sup>236</sup> Casinos are obliged to carry out controls to ensure that barred players are not permitted to play.<sup>237</sup>

#### 6.3.1.4.3 *The regulation of gambling in amusement arcades*

Whereas land-based casinos are subject to strict rules and casino-games may be offered only by the state or state-licensed companies, a less restrictive regime applies to gambling

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227 Becker 2011, p. 199-202.

228 Staatsvertrag zum Glücksspielwesen in Deutschland (*Glücksspielstaatsvertrag* – GlüStV) of 15 December 2011. For a detailed analysis, see Pagenkopf 2012, p. 2918-2924.

229 § 1 GlüStV.

230 § 2 (2) and § 20 (1) GlüStV.

231 European Casino Association 2013, p. 48; Gamblingdata 2011, p. 7. See also Becker 2011, p. 195.

232 Since offering gambling services over the internet is illegal, online casino games are not allowed at all (§ 4 (4) GlüStV).

233 European Casino Association 2013, p. 48.

234 § 2 (2) and § 6 GlüStV.

235 European Casino Association 2013, p. 49.

236 See § 23 GlüStV. Barring can take place on the request of the player, at the initiative of casino operators or on request by a directly involved third party (European Casino Association 2013, p. 49).

237 § 20 (2) GlüStV.

in amusement arcades, restaurants and bars. Though the latter form of gambling is in practice the most problematic, the operation of gambling machines in amusement arcades, restaurants and bars is seen as a commercial activity. As a result, private companies may offer slot machines in these places.<sup>238</sup> However, both the *Glücksspielstaatsvertrag* of 2011 and the *Gewerbeordnung* contain conditions and limitations for gambling in amusement arcades.

As a general rule, the operation of an amusement arcade or game hall (*Spielhalle*) requires a written and time restricted licence from the competent state authority. A licence can be subject to conditions and will in any event only be granted if the game hall is compatible with the aforementioned fundamental objectives of the *Glücksspielstaatsvertrag*.<sup>239</sup> In this case too, the applicant has to submit a social-concept, containing the intended measures to prevent the socially harmful effects of gambling.<sup>240</sup> In addition, the *Länder* can not only impose minimum distance requirements between game halls, but can also decide that a municipality may only grant a limited number of licences for such establishments.<sup>241</sup>

### 6.3.2 *Public procurement law*

Germany has incorporated article 45 of Directive 2004/18/EC<sup>242</sup> and article 39 of Directive 2009/81/EC<sup>243</sup> into its domestic public procurement legislation. Therefore, a person or a firm shall be excluded from participation in procurement procedures when the contracting authority has knowledge that this person – or, in the case of a firm, a person whose conduct has to be attributed to the firm – has been finally convicted in Germany or in another State for the forming of a criminal or terrorist organisation; money laundering or hiding unlawfully obtained financial benefits; fraud; subsidy fraud; bribery; or tax evasion. However, a derogation from this ground for mandatory exclusion is possible for overriding requirements in the general interest and provided that other companies can not adequately provide the necessary services. Furthermore, derogation is allowed if particular circum-

238 See Becker 2008, p. 161-164; Becker 2011, p. 202-206.

239 § 2 (3), § 4(1) and § 24 GlüStV. See also § 33i GewO.

240 § 2 (3) and § 6 GlüStV.

241 See § 25 GlüStV.

242 Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, O.J. 2004, L 134/114.

243 Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, O.J. 2009, L 216/76.

stances of the individual case indicate that the offence committed does not question the reliability of the company.<sup>244</sup>

Besides these mandatory grounds for exclusion, German public procurement law contains a number of discretionary grounds allowing public authorities to prevent a person or a firm from taking part in a public procurement process. Important examples are applicants not complying with their legal obligation to pay taxes or social security contributions or who are guilty of serious misconduct. Furthermore companies in the process of liquidation can be excluded.<sup>245</sup>

It should be noted that public procurement rules adopted pursuant to Directive 2004/18/EC are revised and modernised by Directive 2014/24/EU<sup>246</sup>, which contains significant additions both to the mandatory and discretionary grounds for exclusion of economic operators from participation in a procurement procedure. New offences, for instance terrorist offences, offences linked to terrorist activities and child labour or other forms of human trafficking offences, have been added to the existing list of offences resulting in a mandatory exclusion. In addition, an economic operator shall be excluded from participation in a procurement procedure if he does not fulfil his obligations relating to the payment of taxes or social security contributions, provided that this infringement has been established by a judicial or administrative decision having final and binding effect. In the absence of such a decision, the economic operator nevertheless can be excluded if the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions. Also Directive 2014/24/EU contains other new discretionary grounds for exclusion, like bankruptcy or insolvency of the economic operator.<sup>247</sup>

### 6.3.3 *The prohibition of an association*

#### 6.3.3.1 **The freedom of association and its restrictions**

According to article 9 of the Basic Law all Germans have the right to form corporations and other associations. This fundamental right of freedom of association is, however,

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244 § 6 EG Vergabe- und Vertragsordnung für Leistungen, Teil A (VOL/A); § 6 EG and § 6 VS Vergabe- und Vertragsordnung für Bauleistungen, Teil A (VOB/A); and § 4 Vergabeordnung für freiberufliche Dienstleistungen (VOF).

245 § 6 EG Vergabe- und Vertragsordnung für Leistungen, Teil A (VOL/A); § 6 EG and § 6 VS Vergabe- und Vertragsordnung für Bauleistungen, Teil A (VOB/A); and § 4 Vergabeordnung für freiberufliche Dienstleistungen (VOF).

246 Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, O.J. 2014, L 94/65. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2014/24/EU by 18 April 2016. Directive 2004/18/EC is repealed with effect from that date.

247 See article 57 Directive 2014/24/EU.

subject to limitations. Associations whose aims or activities contravene the criminal laws or that are directed against the constitutional order or the concept of international understanding are indeed prohibited.<sup>248</sup> Although the second paragraph of article 9 of the Basic Law prohibits these types of associations, the protection of the freedom of association as well as the principle of legal certainty require that the criminal or unconstitutional character of the association shall be determined in a specific procedure, which can lead to the issuing of a prohibition order (*Verbotsverfügung*).<sup>249</sup> This procedure is regulated in the *Gesetz zur Regelung des öffentlichen Vereinsrechts (Vereinsgesetz)* of 5 August 1964<sup>250</sup>, which is applicable to any association – regardless its legal form – consisting of several natural or legal persons who voluntarily act with a common purpose for a long period of time and subjected themselves to organised decision-making.<sup>251</sup>

The prohibition of an association can not only be based on the aim or activities of the association itself, but under certain conditions also on acts committed by its members. This is possible if these acts are connected with the activities or the aim of the association. Moreover, it is required that the acts are the result of an organised decision-making and that it can be assumed that the association condones the acts.<sup>252</sup>

In the following sections we will discuss firstly the aforementioned types of prohibited associations. Subsequently, the prohibition order will be dealt with.

### 6.3.3.2 Associations contravening the criminal law

Associations whose aims contravene the criminal laws shall be prohibited pursuant to article 9 (2) of the Basic Law and § 3 (1) of the *Vereinsgesetz*. In this context, the aim of an association can be demonstrated by means of its program, statements or speeches made by the members, propaganda material, documents published on behalf of the association, and so on.<sup>253</sup> In line with this, it is fairly obvious that a criminal or a terrorist organisation – whose formation is a criminal offence pursuant to §§ 129, 129a and 129b of the *Strafgesetzbuch* – will be prohibited.<sup>254</sup>

248 Foreigners are not protected by article 9 of the Basic Law. They can, however, form an association on the basis of § 1 of the *Vereinsgesetz*. Such an association can not only be prohibited in the three mentioned cases, but also when it prejudices or endangers essential interests of Germany (§ 14 *Vereinsgesetz*. See Stein & Frank 2010, p. 335-336; Sailer 2007a, p. 278-279).

249 Maurer 2010, p. 760.

250 See also the *Verordnung zur Durchführung des Gesetzes zur Regelung des öffentlichen Vereinsrechts (Vereinsgesetz)* of 28 July 1966.

251 § 2 (1) *Vereinsgesetz*. Political parties and parliamentary fractions are no association within the meaning of the *Vereinsgesetz* (§ 2 (2) *Vereinsgesetz*). Political parties that seek to undermine or abolish the free democratic basic order or to endanger the existence of Germany shall however be unconstitutional according to article 21 (2) of the Basic Law. The *Bundesverfassungsgericht* rules on this question of unconstitutionality.

252 § 3 (5) *Vereinsgesetz*.

253 Baudewin 2013, p. 1050.

254 Ipsen 2009, p. 164.

In addition, associations with a legitimate aim, but who carry out activities contrary to the criminal law, shall be prohibited.<sup>255</sup> Although under German law only the natural persons belonging to the association can be held criminally responsible for the offences they commit and the association itself can only be sanctioned within the framework of the administrative *Ordnungswidrigkeitenverfahren*, this does not alter the fact that the committing of offences by association members can – under certain conditions – lead to the compulsory dissolution of the association. This will be the case if the criminal activities of the functionaries or members or the association can be attributed to the association itself. In this respect, a prohibition on the basis of article 9 (2) of the Basic Law and § 3 (1) of the *Vereinsgesetz* does not require that the committing of offences is the main purpose or the main activity of the association. It suffices that criminal offences committed by the members of the association are considered to be of such a nature that they shape the character of the association. This will be the case if the association supports the delinquent behaviour of the members in a spirit of solidarity and/or is covering up the offences. In applying this rule, for instance various violent motorcycle clubs and gaming clubs were qualified as associations contravening the criminal law.<sup>256</sup>

#### 6.3.3.3 Unconstitutional associations

Associations that are directed against the constitutional order shall be prohibited. This refers to the *Kernsubstanz der Verfassung* and corresponds to the concept of the free democratic basic order.<sup>257</sup> The prohibition reflects the idea of the so-called ‘militant’ or ‘combative’ democracy, which should be understood against the background of the experiences with the Nazi regime. In principle, it means that a democracy should be combative in order to be able to assure its own continued existence.<sup>258</sup> In other words, genuine threats to the political system must be met and the enemies of democracy should not be in the position to be able to exploit the freedoms inherent in democracy.<sup>259</sup> This does not interfere with the fundamental right of freedom of expression, since an association may critically question the principles of the free democratic basic order and may formulate and discuss constitutional alternatives. However, associations who seek to continuously undermine this order and who are characterised by an actively belligerent, aggressive attitude are not tolerated.<sup>260</sup> In application of this principle, a number of right-wing and left-wing extremist associations were prohibited.<sup>261</sup>

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255 Art. 9 (2) GG; § 3 (1) *Vereinsgesetz*.

256 See Planker 1998, p. 113-115. For a comprehensive list, see Baudewin 2013, p. 1052-1054.

257 Ipsen 2009, p. 164; Maurer 2010, p. 756 and 760.

258 Burkens & Van Schagen 2004, p. 318.

259 Kommers & Miller 2012, p. 285.

260 Baudewin 2013, p. 1050-1051; Planker 1998, p. 116.

261 For an overview, see Baudewin 2013, p. 1052-1054.



The militant democracy is also a rationale for the prohibition of associations directed against the concept of international understanding.<sup>262</sup> This concept relates to the fundamental and indispensable rules of international law guaranteeing a peaceful co-existence of nations.<sup>263</sup>

#### 6.3.3.4 The prohibition order

Pursuant to § 3 (1) of the *Vereinsgesetz*, an association may only be treated as prohibited after an administrative investigation<sup>264</sup> by the competent authority (*Verbotsbehörde*), which results in the issuing of a so-called *Verbotsverfügung*. In this administrative order the *Verbotsbehörde* declares (a) that the aims or activities of the association contravene the criminal laws or (b) that the association is directed against the constitutional order or the concept of international understanding. The *Verbotsverfügung* implies not only the compulsory dissolution of the association, but will in principle also lead to the seizure and confiscation of the association's assets.<sup>265</sup> As a consequence, the members of the forbidden association will not be able to use the financial means of this association to create a new association with the same aim or with a view to similar activities.<sup>266</sup> Furthermore, infringements of the prohibition order constitute a criminal offence under § 20 of the *Vereinsgesetz*.

Insofar as the organisation and activities of the association remain limited to the territory of one state, the *oberste Landesbehörde*<sup>267</sup> – i.e. the Ministry of Interior<sup>268</sup> – will act as *Verbotsbehörde*.<sup>269</sup> Associations operating in more than one state, can be prohibited by the Federal minister of Internal Affairs.<sup>270</sup> Since the *Verbotsverfügung* has to be regarded as an administrative act which affects the rights of the association concerned, the latter must be given the opportunity of commenting on the facts relevant to the decision to prohibit its existence.<sup>271</sup> This right to be heard is not an absolute right (*supra*, Section 6.2.2.3.1).

The *Vereinsverbot* can be enforced once the prohibition order is served to the association or at the latest when this order is published in the *Bundesanzeiger*.<sup>272</sup> The association concerned can bring an action against the prohibition order before the competent administrative court.<sup>273</sup> Whereas the *Oberverwaltungsgericht* shall adjudicate in first instance

262 Art. 9 (2) GG. See also § 3 (1) *Vereinsgesetz*.

263 Ipsen 2009, p. 164.

264 The investigative powers are regulated in § 4 of the *Vereinsgesetz*.

265 § 3 (1) *Vereinsgesetz*. The seizure and confiscation are regulated in §§ 10-13 of the *Vereinsgesetz*.

266 Baudewin 2013, p. 1051.

267 The Länder can however designate another competent authority.

268 Sailer 2007a, p. 275.

269 § 3 (2), 1° *Vereinsgesetz*.

270 § 3 (2), 2° *Vereinsgesetz*.

271 Baudewin 2013, p. 1049; Planker 1998, p. 114.

272 § 3 (4) *Vereinsgesetz*.

273 Maurer 2010, p. 761; Sailer 2007a, p. 276 and 281-282.

on actions against prohibition orders issued by the *oberste Landesbehörde*<sup>274</sup>, the *Bundesverwaltungsgericht* shall rule in first and last instance on actions brought against prohibition orders issued by the Federal minister of Internal Affairs.<sup>275</sup> Although an action in principle shall have suspensive effect, this will not be the case if immediate execution was ordered by the competent *Verbotsbehörde*.<sup>276</sup>

#### 6.4 INSTRUMENTS DIRECTED AT PREVENTING THE DISTURBANCE OF PUBLIC ORDER

##### 6.4.1 *Police services and Ordnungsbehörden*

In Germany, the maintenance of public order and security is a shared responsibility of the police services and the *Ordnungsbehörden*, which both are entrusted with the task of *Gefahrenabwehr*, i.e. preventing and averting dangers for the public order and security.<sup>277</sup> The federal police (*Bundespolizei*) carries out its duties according to the Federal Police Act, whereas the police services of the states (*Länderpolizei*) operate on the basis of the police laws of the *Länder*. The *Gefahrenabwehr* by police services is characterised by actions on the spot which aim at protecting or, when necessary, restoring public order, security and health in an individual case.<sup>278</sup> By contrast, the *Ordnungsbehörden* are administrative authorities which operate pursuant to the *Ordnungsrecht* in a more formal and bureaucratic way and are not only competent for the *Gefahrenabwehr* in individual cases, but can also enact general abstract rules to prevent and avert dangers.<sup>279</sup>

The maintenance of public order and security on the basis of the *Ordnungsrecht* is of particular importance with regard to the administrative approach to combating organised crime. The *Ordnungsrecht* can generally be defined as the area of the law dealing with the organisation, the tasks and the competences of the *Ordnungsbehörden*. It is based on different sources of law: (a) specific laws of both the Federation – e.g. the Trade Regulation Act and the Licensing Act – and the *Länder*; (2) general statutes from the *Länder*, for example the *Ordnungsbehördengesetz*<sup>280</sup> in Nordrhein-Westfalen<sup>281</sup>; and (3) general

274 § 48 (2) *Verwaltungsgerichtsordnung* (VwGO).

275 § 50 (1) 2° VwGO.

276 § 80 (1) and (2) VwGO.

277 Götz 2013, p. 173; Kugelman 2012, p. 4.

278 Pieroth, Schlink & Kniesel 2012, p. 28-30.

279 Knemeyer 2007, p. 252; Pieroth, Schlink & Kniesel 2012, p. 29.

280 Gesetz über Aufbau und Befugnisse der Ordnungsbehörden – Ordnungsbehördengesetz (OBG).

281 For an overview of the sixteen *Länder*, see Pieroth, Schlink & Kniesel 2012, p. 42-56.

administrative law at the level of both the Federation – e.g. the *Verwaltungsverfahrensgesetz* – and the *Länder*.<sup>282</sup>

There is no uniformity between the *Länder* with regard to the organisation of the *Gefahrenabwehrbehörden*. Basically, two types can be distinguished. The first type of organisation is the *Einheitssystem* – also called *Mischsystem*<sup>283</sup> –, which is based on the traditional Prussian model and is characterised by the fact that no formal distinction is made between police authorities and *Ordnungsbehörden*. This implies that one single authority – “*der Polizei*” – is responsible for the *Gefahrenabwehr*. It should be noted, however, that this authority is divided into the police service – the *Polizeivollzugsdienst*<sup>284</sup> – on the one hand and general and specific *Polizei(verwaltungs)behörden* – which are, among others, entrusted with the task of the *Gefahrenabwehr* on the basis of the *Ordnungsrecht* – on the other hand. The *Einheitssystem* is in force in Baden-Württemberg, Bremen, the Saarland and Sachsen.<sup>285</sup>

The other twelve *Länder* opted for a second type of organisation, namely the *Trennungssystem* or *Ordnungsbehördensystem*. As the name makes clear, this system is based on a clear separation at the institutional level between *Polizeibehörden*, performing police tasks, and *Ordnungsbehörden*<sup>286</sup>, which are in principle responsible for the *Gefahrenabwehr*. In these *Länder* the competence of the police services in relation to the *Gefahrenabwehr* is limited to urgent cases. It is noteworthy that the *Trennungssystem* does not necessarily imply that there should be separate laws for the police and the *Ordnungsbehörden*. Such separate laws indeed only exist in Bayern, Brandenburg, Nordrhein-Westfalen and Thüringen. In the other *Länder* the organisation and competences of the police and the *Ordnungsbehörden* are laid down in one and the same law.<sup>287</sup>

#### 6.4.2 Public order maintenance by the *Ordnungsbehörden*

With regard to the public order maintenance by the *Ordnungsbehörden*, a distinction must be made between two situations. In the first place, an *Ordnungsbehörde* can issue an order to prevent or avert a danger for the public order and security in an individual case. Such a *Verfügung* has to be qualified as an administrative act (*Verwaltungsakt*)<sup>288</sup>, which, in the absence of specific rules to the contrary, will be issued according to the procedure laid

282 Gusy 2011, p. 237-238.

283 Thiel 2013, p. 35.

284 In Saarland the term *Vollzugspolizei* is used (Kugelman 2012, p. 59).

285 Kugelman 2012, p. 29 and 59-60; Schenke 2011, p. 277-278.

286 Some of the *Länder* use a different term, namely *Verwaltungsbehörden der Gefahrenabwehr* (Hamburg, Niedersachsen and Sachsen-Anhalt), *Sicherheitsbehörde* (Bayern) and *Gefahrenabwehrbehörde* (Hessen). See Kugelman 2012, p. 29 and 60.

287 Kugelman 2012, p. 29 and 59-60; Schenke 2011, p. 278-279.

288 Kugelman 2012, p. 247.

down in the federal *Verwaltungsverfahrensgesetz* and the *Verwaltungsverfahrensgesetze* of the *Länder*.<sup>289</sup> Although a *Verfügung* is in principle intended to regulate an individual case, the *Ordnungsbehörden* can also issue an *Allgemeinverfügung* or general order, which is directed at a group of people defined or definable on the basis of general characteristics (*supra*, Section 6.2.1).<sup>290</sup>

Secondly, the *Ordnungsbehörden* are competent to issue general rules to protect public order and security. Such regulations or byelaws are enacted in the form of *Ordnungsbehördliche Verordnungen*<sup>291</sup> – or *Polizeiverordnungen* in the *Länder* with the *Einheitssystem* – and contain orders and prohibitions directed against an indefinite number of cases and of persons.<sup>292</sup> An *Ordnungsbehördliche Verordnung* is based on the concept of ‘abstract danger’, which means that this instrument can be used if there is a sufficient degree of probability on the basis of objective facts that damages will occur in the (near) future.<sup>293</sup> In this perspective an *Ordnungsbehördliche Verordnung* can stipulate that a permit or a licence is required for certain activities.<sup>294</sup>

Although this *Gefahrenabwehr durch Rechtsverordnung* has a long historical tradition, its practical importance has diminished in the last decades. This is mainly due to the growing number of specific laws regulating matters that used to be regulated by *Ordnungsbehördliche Verordnungen*. Important examples of this evolution are the building inspectorate regulations that are mainly incorporated in the *Landesbauordnungen* and the provisions of the *Gewerbeordnung* concerning the practice of a trade.<sup>295</sup> If such a specific law is applicable, an *Ordnungsbehördliche Verordnung* can only be issued on the condition that this law expressly allows the *Ordnungsbehörden* to do so.<sup>296</sup> Notwithstanding this evolution, *Ordnungsbehördliche Verordnungen* still are an important instrument to regulate certain aspects of social life, such as human behaviour in public spaces.<sup>297</sup>

#### 6.4.3      *The closure of premises*

As appears from the above, business premisses, pubs, restaurants and brothels can under certain conditions be closed on the basis of the *Gewerbeordnung* or the *Gaststättengesetz*. Apart from these sector-specific laws, the state police laws grant the police the power to

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289 Knemeyer 2007, p. 254 and 257.

290 Götz 2013, p. 242-243; Kugelman 2012, p. 247.

291 Also known under other terms, such as *Verordnungen zur Gefahrenabwehr* and *Verordnungen über die öffentliche Sicherheit (oder Ordnung)* (see Pieroth, Schlink & Kniesel 2012, p. 185-186).

292 Götz 2013, p. 240; Kugelman 2012, p. 250.

293 Gusy 2011, p. 239-241; Thiel 2013, p. 235.

294 Götz 2013, p. 241-242.

295 Schenke 2011, p. 347; Wolffgang, Hendricks & Merz 2011, p. 141.

296 Gusy 2011, p. 239.

297 Gusy 2011, p. 239. For a general overview, see Götz 2013, p. 244-248.

seize goods. This *Sicherstellung*<sup>298</sup> can be applied not only to movable goods, but also to immovable property<sup>299</sup>, such as parcels of land, buildings and other premises.<sup>300</sup> Within the scope of this study it is particularly important that immovable property can be seized if this is required to avert an actual threat to public order.<sup>301</sup> This danger can originate from the characteristics of the property. However, it is also possible that the danger is a result of the way the owner or possessor uses the property.<sup>302</sup>

Whereas some authors consider the seizure in the context of the *Sicherstellung* as a merely factual act (*Realakt*)<sup>303</sup>, the most convincing viewpoint seems to be that the administrative seizure of immovable goods has to be qualified as an administrative act (*Verwaltungsakt*). Consequently, the police can take the necessary measures – e.g. the sealing of the property or the replacement of the lock of a house – to enforce the seizure<sup>304</sup>, which can last as long as necessary to neutralise the danger.<sup>305</sup> As soon as the conditions for the *Sicherstellung* are no longer fulfilled, the property has to be returned to the owner or possessor.<sup>306</sup> It should be noted that the qualification of the administrative seizure as a *Verwaltungsakt* implies that the person concerned can request by means of an action (*Anfechtungsklage*) the rescission of the *Sicherstellung*.<sup>307</sup>

## 6.5 THE INFORMATION POSITION OF THE ADMINISTRATIVE AUTHORITIES

### 6.5.1 *Exchange of information between administrative authorities*

#### 6.5.1.1 **Exchange of information at national level**

As a general rule administrative authorities have a duty to assist one another. The so-called *Amtshilfe* implies that each authority shall render assistance to other authorities, when it is requested to do so.<sup>308</sup> Such official assistance may be requested particularly when an

298 Most of the *Länder* use *Sicherstellung* as an overarching concept. Only Baden-Württemberg and Sachsen make a distinction between the safekeeping of an object in the interest of the owner (*Sicherstellung*) and the seizure of an object in the general interest (*Beschlagnahme*). See Pieroth, Schlink & Kniesel 2012, p. 340; Schmidt 2014, p. 194.

299 Götz 2013, p. 71; Schmidt 2014, p. 194.

300 Rachor 2007, p. 637.

301 See, for instance, § 43, 1° Polizeigesetz des Landes Nordrhein-Westfalen (PolG NRW).

302 Pieper 2013, p. 150-151; Pieroth, Schlink & Kniesel 2012, p. 343; Schmidt 2014, p. 198.

303 See, for example, Rachor 2007, p. 637. Some authors differentiate between different hypotheses (see, for instance, Thiel 2013, p. 202-203).

304 Schmidt 2014, p. 194-196. See also Rachor 2007, p. 637.

305 Rachor 2007, p. 649-650.

306 Götz 2013, p. 74; Gusy 2011, p. 168-169; Thiel 2013, p. 207.

307 § 42 (1) VwGO. For a detailed analysis, see Schmidt 2014, p. 205-207.

308 § 4 (1) VwVfG.

authority cannot perform the official act itself due to legal or material<sup>309</sup> reasons. Furthermore an authority can request *Amtshilfe* when in carrying out its tasks, it requires knowledge of facts unknown to and unobtainable by it or it needs documents or other evidence in the possession of the authority approached. Additionally, official assistance is also possible if an authority could only carry out the task at substantially greater expense than the authority approached.<sup>310</sup>

In relation to the applicable law, a distinction must be made. Whereas the law applying to the authority requesting assistance determines the admissibility of the measure to be put into effect by official assistance, the *Amtshilfe* shall be carried out in accordance with the law applying to the authority of which the request is made.<sup>311</sup> In that perspective the requested authority shall be responsible for the execution of the official assistance. However, the authority requesting assistance is responsible vis-à-vis the requested authority for the legality of the measure to be taken.<sup>312</sup>

Although there is in principle an obligation to render assistance, the Administrative Procedure Act imposes a number of restrictions on this general rule. First of all, the authority approached can be unable to provide assistance for legal reasons. *Amtshilfe* needs to be refused as well when the requested assistance would be detrimental to the Federal Republic or to one of the *Landër*. Furthermore § 5 (2) VwVfG stipulates explicitly that the authority approached shall not be obliged to submit documents or files nor to impart information when proceedings must be kept secret either by their nature or by law.<sup>313</sup>

Apart from these mandatory grounds for the refusal of official assistance there are some circumstances in which the approached authority has the possibility to render assistance without being obliged to do so. There is no obligation to provide *Amtshilfe* when the authority concerned could only provide such assistance at disproportionately great expense or when another authority can provide the same assistance with much greater ease or at much lower cost. *Amtshilfe* can also be refused when the requested authority could only provide assistance by seriously jeopardising its own work.<sup>314</sup> These three grounds for refusal are exhaustive. This implies that the authority approached may not refuse *Amtshilfe* on the grounds that it considers the request inappropriate for other reasons or that it considers the purpose for which *Amtshilfe* was requested inappropriate.<sup>315</sup>

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309 Such as the lack of personnel or equipment.

310 § 5 (1) VwVfG.

311 § 7 (1) VwVfG.

312 § 7 (2) VwVfG.

313 § 5 (2) VwVfG.

314 § 5 (3) VwVfG.

315 § 5 (4) VwVfG.

### 6.5.1.2 Exchange of information at European level

On the basis of § 8a VwVfG German administrative authorities can – and in some cases are obliged to<sup>316</sup> – request assistance from administrative authorities of the other Member States of the European Union.<sup>317</sup> In the opposite direction, every German administrative authority shall comply with a request for assistance from an administrative authority of a Member State of the European Union insofar as this is required according to legal instruments of the European Union.<sup>318</sup> However, if such requests are not translated into German language, they will only be executed if their content appears from the annexed documents in German language.<sup>319</sup> Furthermore the German authorities can refuse the execution of a request if the competent foreign administrative authority does not sufficiently indicate the reasons for the assistance needed.<sup>320</sup>

Apart from the execution of requests for official assistance the *Verwaltungsverfahrensgesetz* allows the spontaneous cross-border exchange of information through information networks that are established for this purpose. Insofar as this is required according to legal instruments of the European Union, the competent German authorities may, without being so requested, send information about facts and persons to both the administrative authorities of the other Member States of the European Union and the Commission.<sup>321</sup> If this is provided for in the legal instruments of the European Union, the German authorities are obliged to inform the person concerned of the fact of the transmission of the information.<sup>322</sup>

### 6.5.2 Data from criminal case files

Subject to certain conditions, § 474 II of the Code of Criminal Procedure allows information from a criminal case file to be provided to public agencies, for example administrative authorities. More specifically personal data from criminal proceedings may be *ex officio* transmitted to administrative authorities if this is allowed on the basis of a special provision. Following such an *ex officio* transmission, further personal data may be transmitted if this is necessary for the performance of duties by the administrative authority.<sup>323</sup> The data from a criminal case file can then be used by the administrative authority to implement an already issued administrative measure. In addition, it can also be useful to have such data

316 Such an obligation exists only if the legal instruments of the European Union contain an obligation to request administrative assistance.

317 § 8a (2) VwVfG.

318 § 8a (1) VwVfG.

319 § 8b (2) VwVfG.

320 § 8b (3) VwVfG.

321 § 8d (1) VwVfG.

322 See § 8d (2) VwVfG.

323 § 474 II 2° StPO.

available previous to the issuing of an administrative act. In that perspective the public prosecution service may provide information from a criminal case file to an administrative authority if this information is required in order to prepare measures. This second form of provision of information shall only be admissible with regard to measures upon whose implementation personal data from criminal proceedings may, *ex officio*, be transmitted to administrative authorities pursuant to a special provision.<sup>324</sup>

In both cases the public prosecution service or, where appropriate, the judge<sup>325</sup> will transmit the data to the administrative authority, which in principle shall not be able to inspect the criminal case file itself. However, inspection of the files may be granted if the provision of information requires disproportionate effort or if the administrative authority declares, indicating the reasons, that the provision of partial information would not be sufficient for the performance of its duties.<sup>326</sup> Under these conditions the criminal case file may be sent to the administrative authority<sup>327</sup>, which may also inspect officially impounded pieces of evidence<sup>328</sup>.

The transmission of data from criminal case files to administrative authorities requires a specific statutory provision. One of the most important provisions in this context is the *Einführungsgesetz zum Gerichtsverfassungsgesetz* (EGGVG), which contains an extensive set of legal rules concerning the so-called *Verfahrensübergreifende Mitteilungen von Amts wegen*.<sup>329</sup> In the framework of this study two aspects are of particular importance. First, personal data of the accused concerning the subject of the criminal procedure may be transmitted to an administrative authority when knowledge of this data is required for the revocation, the withdrawal or the restriction of an administrative licence, permit or authorization to practice a trade. Exchange of personal data from criminal case files to an administrative authority is admissible either when the data indicate that the person concerned violates his professional obligations or when they raise doubts about his suitability or reliability.<sup>330</sup> Secondly, personal data may be transmitted to administrative authorities when knowledge of these data is required to avert substantial danger to the public welfare or public safety.<sup>331</sup>

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324 § 474 II 3° StPO.

325 In preparatory proceedings and after final conclusion of proceedings, the public prosecutor shall decide whether to provide information and allow inspection of the criminal case file; otherwise the presiding judge of the competent court shall decide (see § 478 StPO).

326 § 474 III StPO.

327 § 474 V StPO.

328 § 474 IV StPO.

329 See § 12 to § 22 EGGVG.

330 § 14 (1) 5 EGGVG.

331 See § 17 EGGVG.



### 6.5.3 *Data regarding criminal convictions*

In the perspective of an administrative approach to combating organised crime, it is appropriate for an administrative authority to be aware of the criminal past of applicants for permits or subsidies and applicants submitting tenders. The necessary information is available in the *Bundeszentralregister*, which is subject to the authority of the federal Minister of Justice<sup>332</sup> and contains among others data about criminal convictions and other judicial decisions in criminal matters. In addition, administrative decisions which are relevant from a criminal law perspective<sup>333</sup> – for example the withdrawal or revocation of certain permits and the prohibition to practice a trade<sup>334</sup> – are recorded in the *Bundeszentralregister*.<sup>335</sup> In contrast to the courts and the public prosecution service, who have upon request an unrestricted right of access to the information in the *Bundeszentralregister*<sup>336</sup>, administrative authorities can only receive a so-called Certificate of Good Conduct (*Führungszeugnis*) insofar as they need it for the exercise of their functions.<sup>337</sup> This Certificate of Good Conduct, which in principle can also be asked from the person concerned<sup>338</sup>, contains only the data mentioned in § 32 BZRG.

### 6.5.4 *Tax information*

Public officials<sup>339</sup> shall be obliged to observe tax secrecy<sup>340</sup>, which comprises not only all findings gathered in administrative proceedings, auditing procedures or in judicial proceedings in tax matters, but also all findings gathered in criminal proceedings for tax crimes or in administrative fine proceedings for tax offences.<sup>341</sup> As a consequence, the Tax Administration cannot provide tax information to other administrative authorities. This general rule is, however, subject to a number of exceptions. For example, tax information may be disclosed insofar as it serves the implementation of either another administrative, auditing or judicial procedure in tax matters or a criminal procedure for tax crimes. Disclosure of tax information shall also be permissible insofar as law expressly permits it or the persons concerned give their consent. Furthermore, tax information may be disclosed

332 § 1 Gesetz über das Zentralregister und das Erziehungsregister (Bundeszentralregistergesetz – BZRG).

333 Roxin & Schünemann 2012, p. 497.

334 § 10 (2) BZRG.

335 § 3 BZRG.

336 § 41 BZRG.

337 § 31 (1) BZRG. See Kindhäuser 2013, p. 341–342; Roxin & Schünemann 2012, p. 498.

338 § 31 (1) BZRG.

339 See § 7 Abgabenordnung (AO).

340 § 30 (1) AO.

341 See § 30 (2) AO.

when there is a compelling public interest in the disclosure.<sup>342</sup> Although the concept of 'compelling public interest' is not defined in § 30 of the *Abgabenordnung*<sup>343</sup>, it is clear that it should be interpreted restrictively and that disclosure of tax information on this ground is only permissible in cases where there is danger of serious detriment to the public good.<sup>344</sup>

Furthermore, reference must be made to § 31a of the *Abgabenordnung*, which allows disclosure of tax information for the purpose of countering unlawful employment and the misappropriation of benefits. Disclosure of the circumstances of the person concerned shall be permissible under this provision as far as this is necessary to implement criminal proceedings, administrative fine proceedings or any other court or administrative proceedings with the aim of (1) countering unlawful employment or illegal work; (2) deciding whether a licence under the Temporary Employment Act should be issued, withdrawn or revoked; or (3) deciding whether benefits paid from public funds should be approved, granted, recovered, refunded, continued to be granted or allowed to be retained. In addition the circumstances of the person concerned may be disclosed insofar as this is necessary to assert a claim for repayment of benefits paid from public funds. In all these cases the revenue authorities are in principle obliged to disclose to the competent body the facts required in each case. However, this obligation shall not apply insofar as this would involve a disproportionate amount of time and effort.<sup>345</sup>

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342 See § 30 (4) AO.

343 § 30 (4) 5° AO contains only three examples in which a compelling public interest shall be deemed to exist in particular.

344 Pahlke & Koenig 2004, p. 270.

345 § 31a (2) AO.

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## 7 THE ADMINISTRATIVE APPROACH IN ITALY

*F. Calderoni & F. Di Stefano*

### 7.1 INTRODUCTION

#### 7.1.1 *Background*

Italy has developed a complex antimafia legal framework in its struggle against mafia-type associations.<sup>1</sup> Antimafia legislation entered into force in the 1950s as an instrument for tackling the dangerous infiltration of the public system – corruption, for example.<sup>2</sup> The first explicitly antimafia law was adopted in 1965. Its main feature was to ban persons either suspected or convicted of being members of organized crime groups from entering into contracts with public administrations.<sup>3</sup>

The **‘mafia-type association’ is the key concept** when determining the scope of administrative measures. This is because Italy has been dealing with different types of mafia-type associations, including the Sicilian Cosa Nostra, the Neapolitan Camorra and the Calabrian ‘Ndrangheta, since the 19<sup>th</sup> century.<sup>4</sup> The concept of mafia-type association was eventually defined in 1982, with the introduction of the offence of mafia-type association into the Criminal Code. Article 416*bis* paragraph 3 of the Italian Criminal Code defines a ‘mafia-type association’ as follows:

The association is of a mafia-type when the participants use the power of intimidation of the association, and the condition of subjection and omertà (code of silence) that arises from it, to commit crimes, or to obtain – directly or indirectly – control over economic activities, public contracts or concessions,

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1 Frigerio 2009.

2 This kind of normative strategy started with Law no. 1423 of 27 December 1956.

3 According to Law no. 431 of 13 May 1965 followed by Law no. 152 of 22 May 1975. The first law aimed to address persons linked to organized crime groups that have been shown to pose a risk to society by widening the use of personal prevention measures (Law no. 1423 of 27 December 1956). Scholars criticized the law because it did not sufficiently explain the term ‘mafia’. In order to address the loophole, Law no. 152 of 22 May 1975 was enacted.

4 In addition to the definition of a mafia-type association, this report uses the UN definition of ‘organised criminal group’, namely: ‘a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, financial or other material benefits.’ United Nations Convention Against Transnational Organised Crime, Palermo, Italy, December 2000, Article 3.

or to obtain unfair profits for themselves or others, or to impede or jeopardise the free exercise of the right to vote or to gain votes for themselves or others upon elections.<sup>5</sup>

This country report aims to describe the main administrative measures used in the Italian legal system. Section 7.1.2 discusses the historical background of the administrative measures in Italy, highlighting the main events. Section 7.2 discusses the existing screening and/or monitoring of persons regarding their past criminal activities. Section 7.3 discusses instruments to prevent the disruption of public order. Section 7.4 deals with confiscation and seizure, specifically related to criminal organizations. Section 7.5 concerns the dissolution of city councils that have been infiltrated by the mafia.

### 7.1.2 *The history of antimafia measures in Italy*

In Italy, the most relevant antimafia measures were adopted as a result of specific events, such as homicides and mafia attacks on the State.<sup>6</sup> This led scholars to consider antimafia

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5 According to Article 416bis of the Criminal Code:

1. Whoever is part of a mafia-type association consisting of three or more people is punishable with 7 to 12 years of imprisonment.
  2. Whoever promotes or manages or directs such an association is punishable with 9 to 14 years of imprisonment
  3. The association is of a mafia-type when the participants use the power of intimidation of the association, and the condition of subjection and omertà (code of silence) that arises from it, to commit crimes, or to obtain – directly or indirectly – control over economic activities, public contracts or concessions, or to obtain unfair profits for themselves or others, or to impede or jeopardise the free exercise of the right to vote or to gain votes for themselves or others upon elections.
  4. If the association uses weapons the penalty is from 9 to 15 years for the cases provided by the first paragraph and from 12 to 24 years for the cases provided by the second paragraph.
  5. The association is armed whenever the participants have at their disposal, for the achievement of the aims of the association, weapons or explosives, even if hidden or kept in a deposit.
  6. If the economic activities whose control the participants aim to achieve or maintain are financed wholly or in part with the price, the product or the profit of crimes, the penalties provided by the previous paragraphs are increased from one third to the half.
  7. Upon conviction, the confiscation of the assets which served or were allocated to the commission of the crime and the assets which are its price, product, profit or investment is mandatory. 9. These provisions also apply to the camorra and to other associations, whatever their local names, including foreign ones, which, taking advantage of the intimidation power of the association, pursue aims corresponding to those of mafia-type associations.
  8. The previous provisions also apply to the camorra and to other associations, whatever their local names, including foreign ones, which, taking advantage of the intimidation power of the association, pursue aims corresponding to those of mafia-type associations.
- 6 For example, after 1982, the introduction of several antimafia provisions was accelerated by the murders of Member of Parliament Pio La Torre and of General Carlo Alberto Dalla Chiesa, both in Palermo. Moreover, further homicides of judges and policemen – the Capaci and the via D’Amelio assassinations of Giovanni Falcone and Paolo Borsellino – led to other measures such as Legislative Decree no. 306 of 1992 (the ‘Falcone

legislation as the product of an ‘ongoing emergency’ which ultimately created its own problems of coordination and consistency in the antimafia legal system.<sup>7</sup>

Law 575/1965, adopted in the early 1960s, expanded the application of personal preventive measures foreseen in the previous Law 1423/1956. **Preventive measures** are measures adopted by administrative authorities (e.g. the local police chief) imposing a number of obligations or prohibitions to people falling under specific categories prescribed by law (e.g. dangerous subjects). A number of loopholes became clear in the system in the 70s and 80s, and particularly that the term ‘mafia’ had not been sufficiently explained. Several innovations were introduced in the 1980s and 1990s as a reaction to the mafia attacks against politicians, members of the judiciary and of the law enforcement agencies. These innovations concerning new criminal offences, investigatory powers and preventive measures ordered by administrative authorities, e.g. the prohibition against residing in a certain area of a city, and the seizure and the confiscation of property independent of a final criminal conviction.<sup>8</sup> Law 646/1982 was a cornerstone in this process, with two innovations that changed the strategy against mafia-type associations:

- A new provision criminalizing participation in mafia-type association (Article 416-bis of the Italian Criminal Code);
- Introduction of patrimonial prevention measures in addition to personal ones.<sup>9</sup>

In addition, Legislative Decree no. 163 of 12 April 2006 – containing the Code of public contracts for works, services and supplies – reshaped the regulation of public procurement to improve control over this field.<sup>10</sup> More recently, in 2008 and 2009, two laws were enacted to further implement the antimafia legal framework. Firstly, Legislative Decree no. 92/2008, which:

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Act’, dealing with trials and police action in the fight against the mafia) (Fijnaut & Paoli 2004, see also Van de Bunt & Van der Schoot 2003).

7 Moccia 1995.

8 Fulveti 2008.

9 Law no. 646 of 13 September 1982 added patrimonial preventive measures to personal preventive ones, in particular seizure and confiscation. Seizure, a temporary measure, is used when there is a discrepancy between the suspect’s income and his/her lifestyle. Confiscation, a final measure, is applied when a suspect fails to prove that an asset has been derived from a legal source. Moreover, this normative disposition permits financial investigations at every lending institution and in every public administrative office in order to collect useful information. See the definition (p. 3) explaining when an association is considered a mafia-type organization, according to Article 416bis, paragraph 3, of the Criminal Code (See also Fijnaut & Paoli 2004; Savona et al. 1998; UNICRI & BASCAP 2013 and Van de Bunt & Van der Schoot 2003).

10 According to Legislative Decree no. 163 of 12 April 2006, *Codice dei contratti pubblici relativi a lavori, servizi and forniture*, also known as the Code of public contracts for works, services and supplies. As under Directive 2004/17/EC and Directive 2004/18/EC.

- extended patrimonial prevention measures to crimes listed in Article 51, paragraph 3*bis* of the Code of Criminal Procedure;<sup>11</sup>
- made it possible to apply preventive measures for persons suspected of kidnapping for ransom, drug trafficking and human trafficking;
- made it possible to adopt personal and patrimonial prevention measures separately and independently. This ensures that the confiscation system can be applied even against heirs in the event of the relevant person's death;
- introduced equivalent confiscation for persons convicted of being a member of a mafia-type association.

Second, Law no. 94 of 15 July 2009:

- made it possible to apply preventive measures for persons suspected of the unjustified possession of assets;
- made it possible to apply personal and patrimonial prevention measures separately, regardless of the risk the person concerned poses to society;
- updated provisions concerning the dissolution of city councils that have been infiltrated by the mafia. This implemented a rule barring local administrators of a council dissolved owing to mafia infiltration from re-election (Article 143, paragraph 11 of Legislative Decree 267/2000).

Last, in 2011 Legislative Decree no. 159/2011 introduced the 'Code of antimafia laws, relevant preventive measures and new antimafia provisions' (hereafter Antimafia Code). The Antimafia Code combined all the previous legislation into a unique normative corpus<sup>12</sup> and is currently the main reference point for antimafia measures.<sup>13</sup>

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11 The offences listed in Article 51, paragraph 3*bis* of the Code of Criminal Procedure are: Article 416, paragraph 6 and 7, Article 416 for offences indicated in Articles 473, 474, 600, 601, 602, 416*bis* and 630 of the Criminal Code, Article 74 of the Consolidated Law adopted with Decree of the President of the Republic 309/1990, Article 291*quater* of the Consolidated Law adopted with Decree of the President of the Republic no. 43 of 23 January 1973, Article 260 of Legislative Decree no. 152 of 3 April 2006.

12 The promulgation of the Antimafia Code made it possible to apply personal and patrimonial measures separately, i.e. independent of the risk to society posed by the subject (Article 2*bis*, paragraph 6*bis* of Law no. 575 of 1965, introduced by Law no.125 of 2008 and Law no. 94 of 2009). Furthermore, Law no.190 of 6 November 2012 dealt with 'Measures to prevent and suppress corruption and illegality inside public administration.' The Prime Minister's Decree of 18 April 2013 envisaged the setting up and continuous updating of the 'white lists'. Finally, the Stability Law of 2013 (Law no. 228 of 24 December 2012) has updated the confiscation system included in the Antimafia Code.

13 Legislative Decree no. 218 of 15 November 2012 updated the Antimafia Code. It introduced new targets for the antimafia documentation system (Article 85 of the Antimafia Code, further discussed in detail in section 7.2.1). In particular this included European economic interest groupings (EEIGs), members of company audit committees (even companies without legal personality), persons who manage and represent foreign companies (those without a second Italian home office), and gambling operators (organized into capital-based companies).

## 7.2 SCREENING AND MONITORING

This section focuses on existing Italian measures governing the screening and/or monitoring of businesses for the criminal past of natural persons involved in them. Section 7.2.1 deals with the measures on the *documentazione antimafia* (antimafia documentation) Section 7.2.2 discusses other screening and/or monitoring procedures. Section 7.2.3 focuses on the protection extended to the natural and legal persons who are screened and/or monitored.

### 7.2.1 *Documentazione antimafia*

#### 7.2.1.1 History of the legislation

Italy was the first country in the European Union to conduct ‘criminal audits’, i.e. to regulate by law and conduct systematic investigations of the antecedents of companies.<sup>14</sup> In 1994, Legislative Decree 490/1994 introduced the antimafia documentation system. Enterprises or individuals applying for public aid or bidding on public procurement contracts were requested to exhibit an ‘antimafia certificate’, attesting that they had not been involved in mafia-type associations. This not only meant that relevant subjects in the enterprise (e.g. owners, shareholders, administrators) were not convicted of mafia-related offences, but also that no preventive measures had been imposed on them. In 1998, Decree of the President of the Republic no. 252/1998 repealed part of Legislative Decree 490/1994 and updated the system. It distinguished between the antimafia communication and antimafia information and introduced a simplified certification system through the Chambers of Commerce.

In 2010–2011, after more than fifteen years from the introduction of the antimafia documentation, the debate on the effectiveness of the system generated a further reform. The Parliament delegated the Government to reform the antimafia legislation.<sup>15</sup> The guiding principles were to revise and simplify it, in particular regarding antimafia documentation. The Government regulated the system in the second book of the Antimafia Code. Since 2012, this legislation is the new reference point for the antimafia documentation system.<sup>16</sup> The Code has compiled most of the antimafia provisions into a unique legislative corpus that abrogates most of the previous regulations.<sup>17</sup>

14 Van de Bunt & Van der Schoot 2003; White 2000.

15 Article 2, paragraph 1 of Law 136/2010; according to Law 575/1965 and Article 4 of Legislative Decree no. 490 of 1994.

16 Legislative Decree no. 218 of 15 November 2012 introduced corrective dispositions to the antimafia documentation system, foreseen into Antimafia Code, entering into force on 12 February 2013.

17 The Antimafia Code abrogated Law no. 1423 of 27 December 1956 and Law no. 575 of 31 May 1965. Legislative Decree no. 218 of 15 November 2012 introduced corrective dispositions to the antimafia documentation system, foreseen into the Antimafia Code, entering into force of 12 February 2013.

### 7.2.1.2 The Antimafia Code in force

The antimafia documentation system focuses on screening tenderers and licence applicants for mafia infiltration. The aim is to verify whether any of the conditions initially provided for in the 1965 law are present. In specific cases, screening also verifies whether other specific conditions suggest mafia infiltration.

Article 67 of the Antimafia Code provides that an individual who has a preventive measures imposed on him<sup>18</sup> or is convicted of offences listed under Article 51 paragraph 3*bis* of the Italian Criminal Procedure Code cannot be issued any kind of licence or authorization.<sup>19</sup> This includes licences or police authorizations, public concessions, concessions for public works, registration in public registers (i.e. the Chamber of Commerce), attestations to carry out public works, public funding and firearms licences.

According to Article 83 paragraph 1 and 2 of the Antimafia Code, before contracting or issuing concessions or grants, contracting authorities must obtain the required type of antimafia documentation from the Prefecture.<sup>20</sup>

The prefect is a high-level administrative civil servant who has general competence to act on behalf of government at the provincial level.<sup>21</sup> The prefect operates under the authority of the Italian Ministry of the Interior and is in charge of the Prefecture-Territorial Government Office (UTG).<sup>22</sup> It has competence on public order and security at the provincial level; guarantees the security and safety of citizens, the protection of properties, and compliance with national and regional laws and local ordinances. The prefect has access to police forces to enforce these tasks.<sup>23</sup> If the public interest so requires, he may

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18 These are special preventive personal or patrimonial measures of a quasi-criminal nature. The proceedings must be final.

19 The offences listed in Article 51, paragraph 3*bis* of the Code of Criminal Procedure are: Article 416, paragraph 6 and 7, Article 416 for offences indicated in Articles 473, 474, 600, 601, 602, 416*bis* and 630 of the Criminal Code, Article 74 of the Consolidated Law adopted with Decree of the President of the Republic 309/1990, Article 291*quater* of the Consolidated Law adopted with Decree of the President of the Republic no. 43 of 23 January 1973, Article 260 of Legislative Decree no. 152 of 3 April 2006.

20 Article 84 of the Antimafia Code.

21 According to Article 11 of Legislative Decree number 300 of 1999. Functions of the Ministry of Foreign Affairs, Justice, Treasury, Finances, Public Instruction, Cultural Activities and Assets are not part of the prefect's general competence (Legislative Decree no. 300 of 1999). As in most civil-law countries, the Italian legal system is inspired by the French system, established in 1800 by Napoleon. As in other such countries, Italy considers administrative law a distinct branch of the law, aimed at regulating the relationship between citizens and public administration.

22 According to Article 1 of Legislative Decree no. 29 of 2004. Legislative Decrees no. 300 of 1999 and no. 29 of 2004 have changed the Prefecture into the Prefecture-Territorial Government Office (UTG). Currently there are 106 Prefectures in Italy.

23 The prefect is in charge of a provincial committee set up to defend public order and security. See also Section 7.3.1 for a more detailed explanation. Another government body is the Permanent Conference, established by Legislative Decree no. 300/1999 Article 11, updated by Legislative Decree no. 29/2004. Its function is to cooperate with the prefect to coordinate the activities of the local public offices and to guarantee collaboration with local government's representatives. The Permanent Conference is composed of four sections: administration, economic development, environment, and community services. The purpose of this body is to

adopt essential measures, called ‘ordinances’ or ‘decrees’.<sup>24</sup> Furthermore, in the relationship between State and local administrators, he assumes the role of guarantor of administrative activities. This includes monitoring correct procedure during local elections and supervising the suspension of city council administrators.

The competent prefect issues the antimafia documentation, i.e. the *comunicazioni* or the *informazioni*, after consulting the national antimafia database.<sup>25</sup> The prefect’s competence depends on the place of residence of the relevant natural person or the head office of the relevant legal person.<sup>26</sup> The prefect, in cooperation with other law enforcement agencies, must conduct a background check on all the individuals identified in the Antimafia Code prior to awarding licences, permits, concessions, financial allowances and authorizations, before admitting tenders, and before concluding, approving or allowing various contracts.<sup>27</sup> In particular, enterprises or individuals who conclude contracts with administrative authorities must include the antimafia documentation in their bid/application dossier.<sup>28</sup>

According to Article 85, the antimafia checks apply to the following individuals: owners and technical managers of individual enterprises, legal representatives of associations, cooperatives and consortiums, the majority partners in capital companies, all the members of general partnerships, all the general partners in limited partnerships and all local representatives of companies. Moreover, according to Article 2508 of the Italian Civil Code, the legal representative of a foreign company (without a second home office in Italy) must also be screened.<sup>29</sup> Article 85 of the Antimafia Code was updated in 2012 to include new categories, more specifically European economic interest groupings (EEIGs), members of company audit committees (even if the company lacks legal personality), persons who manage and represent foreign companies (without a second Italian home office) and

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mediate in social conflicts. The prefect is the president of the Permanent Conference, whose members are other local authorities.

24 Article 1 and 2 of Royal Decree no. 773 of 1931.

25 Article 83, paragraph 1 and 2; Article 84ss; Article 87 and Article 90 of the Antimafia Code. The Italian Ministry of the Interior manages a national database of antimafia documentation in order to check for ‘impediments’ to the issuing of antimafia documentation (Article 96 of the Antimafia Code; Article 5, paragraph 4, of the Ministry of the Interior Decree of 14 March 2003). The database, which is connected to the computer system of the Antimafia Investigative Directorate (hereafter: DIA), allows users to consult data acquired from the prefect during checks, even information gathered when accessing the construction sites of the companies concerned (Article 102 of the Antimafia Code). In order to verify impediments or mafia infiltration, the data is linked to the Data Elaboration Centre (CED) (Law no. 121 of 1 April 1981 Article 8; Article 99, paragraph 2bis of the Antimafia Code, inserted by Article 6, paragraph 1, of the Legislative Decree no. 218 of 15 November 2012).

26 Article 87, paragraph 1 and Article 90, paragraph 1 of the Antimafia Code.

27 Mastrodomenico 2013. The prefect and the *Guardia di Finanza* (Financial Police) have the power to undertake patrimonial, financial and fiscal investigations in order to check the economic lifestyle, assets and financial means of people subject to the antimafia screening (Article 19 of the Antimafia Code).

28 Article 87, paragraph 1 of the Antimafia Code.

29 Royal Decree no. 262 of 16 March 1942.

gambling dealers (organized into capital-based companies).<sup>30</sup> Also, before issuing the *informazioni*, the Prefecture also checks the applicant's cohabiting family members.

Antimafia documentation consists of two types of checks: *comunicazione antimafia* (antimafia communication), and *informazione antimafia* (antimafia information). Both are defined in Article 84 of the Antimafia Code.

1. *Comunicazione antimafia* certifies the absence of any impediment, i.e. grounds for disqualification, banishment or suspension based on a final preventive judgment, a preventive measure or a criminal conviction for offences listed in Article 51, paragraph 3bis of the Italian Criminal. *Comunicazione antimafia* concerns all aforementioned natural or legal persons covered under Article 85 of the Antimafia Code. Procedure Code.<sup>31</sup>
2. *Informazione antimafia* has a wider scope, allowing investigation of any attempt at mafia infiltration into a company.<sup>32</sup> *Informazione antimafia* gives the prefect and law enforcement agencies greater flexibility. Apart from a check on a natural or legal person's criminal records and pending proceedings, the competent authorities can undertake investigations (similar to criminal investigations) to prove the presence of mafia infiltration. In addition, the prefect has the option of further monitoring and the right to make on-site checks at the construction sites of any company awarded public works contracts.<sup>33</sup>

The type of documentation required depends on the size of the contract or funding. Article 83 of the Antimafia Code regulates the financial threshold for issuing antimafia documentation.<sup>34</sup> Whether antimafia documentation must be requested depends on the value of the contract in question in accordance with a three-tier system:

- when the contract value is below €150,000, no antimafia documentation is required;<sup>35</sup>
- when the contract value is above €150,000 but below the EU threshold for public procurement, the *comunicazione antimafia* is required;<sup>36</sup>

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30 Legislative Decree no. 218 of 15 November 2012.

31 Article 84, paragraph 2 of the Antimafia Code.

32 Article 84, paragraph 3 of the Antimafia Code.

33 Article 93 of the Antimafia Code.

34 Malagnino 2011.

35 According to Article 83 paragraph 3 under e of the Antimafia Code.

36 Article 87 of the Antimafia Code. EU regulation no. 1336/2013 entered into force on 1 January 2014, updating previous EU thresholds for public contracts (Directive 2004/17/EC, Directive 2004/18/EC and Directive 2009/81/EC). For services and supply contracts, the EU thresholds are: for ordinary sectors, €134,000 and €207,000 depending on the type of contract and awarding body. For certain special sectors, the threshold is €414,000. These leave little room to apply antimafia communication in the case of services and supply contracts. For public work contracts, the EU threshold, both for the ordinary and special sectors, is €5,186,000. Consequently, antimafia communication is required for any contract between €150,000 and €5,186,000.



- when the contract value exceeds the EU threshold, or in specifically defined cases,<sup>37</sup> *informazione antimafia* is required.

The antimafia communication and antimafia information are both considered binding acts. They do not leave discretionary power to the contracting authorities,<sup>38</sup> implying that the natural or legal person may not negotiate with public administrators about the outcome of the check.

### The antimafia communication

Natural or legal persons are required to obtain the antimafia communication document when applying or bidding for:<sup>39</sup>

- licences, police or commercial authorizations;
- public concessions;
- concessions for public works (with a value below the EU threshold, and above €150,000);
- entry into public registers (e.g. the Chamber of Commerce);
- certification of qualification to conduct public works;
- entry into public registers or authorization proceedings to conduct entrepreneurial activities;
- public funding awarded by the State, public bodies and the European Communities in order to conduct entrepreneurial activities;
- licences to possess firearms;
- public works contracts valued below €5,186,000 (i.e. the EU threshold);
- services and supply contracts above €150,000 but below €207,000 (ordinary sectors) or €414,000 (special sectors).

The check involving the communication also applies for the relatives of persons subject to preventive measures. Consequently, a preliminary family check must be carried out before the antimafia documentation can be issued. In addition, an antimafia check must be carried out on corporate decision-makers, such as managing directors.<sup>40</sup>

The antimafia communication is not required in some cases, specifically:<sup>41</sup>

37 See Article 91 of the Antimafia Code. antimafia information is mandatory for public concessions for public waters or state property, or for the assignment of public financial contributions aimed at conducting entrepreneurial activities valued at more than €150,000 (Article 91, paragraph 1 under b). The authorization of subcontracts with a value in excess of €150,000 is evaluated on a case-by-case basis.

38 The contracting authorities are the State, local governments, public authorities, associations consisting of local governments or public authorities which serve the public interest (Article 3 paragraphs 25, 32 and 33 of the Code on Public Contracts and Article 1 paragraph 9 of Directive 2004/18/EC).

39 Article 67 paragraph 1 and 2 of the Antimafia Code.

40 Article 67 paragraph 4 of the Antimafia Code.

41 Article 83 paragraph 3 of the Antimafia Code.

- contracts between public subjects: public administrators, public authorities, even when constituted in single contracting authorities, companies controlled by the State (or by another public authority), public works authorities and general contractors;<sup>42</sup>
- contracts between public and other private entities;
- issuing or renewing public security authorizations or licences;
- contracts and grants for self-employed people;
- contracts with a value below €150,000.<sup>43</sup>

The antimafia communication verifies the absence of any ‘impediment’.<sup>44</sup> An impediment exists when a person is subject to a preventive measure and/or a conviction for offences indicated in Article 51, paragraph 3*bis* of the Italian Criminal Procedure Code. The presence of an impediment prevents the person from concluding a contract with the administrative authorities.<sup>45</sup>

The competent prefecture issues the antimafia communication after consulting the national antimafia database. The prefect is competent to perform the checks if he has territorial competence over the place of residence of a natural person or the home office of a legal person. When the subjects of the check reside abroad, the competent prefect has territorial competence over the place where the contract is being executed.<sup>46</sup> If no impediments are detected in the database, the prefect can issue the antimafia communication at once.<sup>47</sup> This communication *enables* the subject of the check to access grants, subsidies or contracts awarded by administrative authorities. The antimafia communication expires six months after it is issued. If an impediment emerges from the database, the prefect conducts further checks.<sup>48</sup> If the impediments are confirmed, the prefect issues a prohibitive antimafia communication.<sup>49</sup> This prohibitive communication *prevents* access to grants, subsidies and contracts awarded by administrative authorities.

The prefect must issue the communication within 45 days, with an option to extend the deadline a further thirty days in the case of complex checks.

If the prefect does not issue the antimafia documentation before the deadline, the subjects can participate in the procurement or be granted licenses and authorizations. However, if impediments are detected after the deadline passes, the grant, funding, concession etc. is revoked, even if the contract has been concluded. Revocation excludes any

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42 Article 176 of Code of Public Contracts.

43 Article 83 paragraph 3 of the Antimafia Code.

44 Article 84, paragraph 2 of the Antimafia Code.

45 Article 84 paragraph 2 of the Antimafia Code.

46 Article 83 paragraph 1 and 2; Articles 87 and 90 of the Antimafia Code and Article 88 paragraph 4 of the Antimafia Code.

47 Article 88 of the Antimafia Code.

48 Article 88 paragraph 2 of the Antimafia Code.

49 Article 88 paragraph 3 of the Antimafia Code.

activities already carried out, with the contractor being reimbursed for costs already incurred in preparing the remaining activities, in line with the contract.

### **Antimafia-information**

The antimafia information supplements the antimafia communication because it enables verification not only of impediments but also of any attempt at mafia infiltration into an enterprise.<sup>50</sup> According to Article 91 of the Antimafia Code, before contracting or issuing administrative acts, contracting authorities<sup>51</sup> must request the antimafia information from the Prefecture.<sup>52</sup> The contracting authority must indicate the name of the company, the object and the value of the contract, and the personal details of people concerned.<sup>53</sup> The antimafia information is required for:<sup>54</sup>

- concessions for public works with a value above the EU threshold;<sup>55</sup>
- public concessions (or subsidies) for entrepreneurial activities valued at more than €150.000;<sup>56</sup>
- authorizations of subcontracts or assignments to build public works or to supply public services valued at more than €150.000;
- public procurement contracts above the EU threshold;
- specific sectors, regardless of the contract value (for example concrete supply and garbage disposal);<sup>57</sup>
- any contract stipulated by a city council within five years of its dissolution for mafia infiltration, regardless of the contract value.<sup>58</sup>

In some specific cases, antimafia information is not required for:<sup>59</sup>

- contracts between public subjects: public administrators, public authorities, even constituted in single contracting authorities, companies controlled by the State (or by

50 Article 84 paragraph 3 and 4 and Article 91 paragraph 6 of the Antimafia Code.

51 I.e. public administrators, public authorities, even constituted in single contracting authorities, companies controlled by the State (or another public authority), public works authorities and general contractors in accordance with Article 176 of the Code of Public Contracts.

52 Article 84, paragraph 3 of the Antimafia Code.

53 According to Article 83 paragraph 1 and 2 and Article 91 paragraph 4 of the Antimafia Code.

54 Article 91 of the Antimafia Code.

55 According to Legislative Decree no. 163/2006, Directive 2004/17/EC and Directive 2004/18/EC, updated by Commission Regulation (EC) 1177/2009.

56 According to Article 91 of the Antimafia Code.

57 According to the last paragraph of Article 91 of Legislative Decree no. 159 of 2011 and the Circular of the Ministry of the Interior no. 4610/2010, these sectors are at risk. Such contractors must therefore adhere to the antimafia information system, regardless of the contract value.

58 Article 143 of Legislative Decree 267/2000 and Article 100 of the Antimafia code. See Section 7.5 for further information.

59 Article 83, paragraph 3 of the Antimafia Code.

another public authority), public works authorities, general contractors (Article 176 of the Code of public contracts);

- contracts between public and other private subjects that have specific requirements of good conduct;
- the issuance or renewal of public security authorizations or licences;
- contracts and grants awarded to self-employed people;
- contracts with a value below €150,000.<sup>60</sup>

The antimafia information verifies the absence of elements showing the infiltration of the mafias in an enterprise. In addition to the impediments concerning the antimafia communication, the following elements are considered evidence of mafia infiltration:<sup>61</sup>

- convictions for offences related to organized crime activities (a final conviction is not required);
- the imposition of pre-trial precautionary measures or convictions for the offences indicated in Articles 353, 353*bis*, 629, 640*bis*, 644, 648*bis*, 648*ter* of the Italian Criminal Code, Article 51 paragraph 3*bis* of the Italian Criminal Procedure Code, and Article 12*quiquies* of Law no. 356 of 1992;
- proposal or imposition of personal or patrimonial preventive measures;
- failure to report specific serious offences (e.g. bribery and extortion in favour of a mafia association), by subjects indicated in Article 38 under b of the Code of Public Contracts; evidence emerging from on-site checks conducted by the prefect at work sites;<sup>62</sup>
- findings from the investigations conducted by the prefects also including the controls on construction sites.
- replacement of the relevant subjects in an enterprise with family members of persons subject to preventive measures or prior convictions;
- repeated violations (within a five-year period) of the obligation to conduct traceable financial transactions.

The competent prefect issues the antimafia information immediately after consulting the national antimafia database, provided the aforementioned issues are not present. The competent prefect is the one with jurisdiction over the natural person's place of residence or legal person's home office.<sup>63</sup> If circumstances to the contrary arise, the prefect can conduct further checks. The introduction of antimafia information has reinforced the prefect's checks by moving from a more formal procedure, in which the absence of impediments

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60 According to Article 91 paragraph 1 under a and c of the Antimafia Code.

61 Article 84 paragraph 4 of the Antimafia Code. See also article 91 paragraph 6 of the Antimafia Code.

62 Article 84 paragraph 4 of the Antimafia Code.

63 According to Article 83 paragraph 1 and 2, Article 86 paragraph 2, Article 91 paragraph 1 and Article 97 of the Antimafia Code.

was evaluated using the Chamber of Commerce database, to a factual and more effective procedure. In cooperation with law enforcement agencies, the prefect can undertake investigations similar to criminal investigations. Furthermore, he can also conduct further activities, e.g. controls at the construction sites.<sup>64</sup> If any of the above issues is identified, the prefect issues 'negative antimafia information' (*informazione antimafia interdittiva*), which prohibits any further license, authorization and public procurement. This information is shared with the national antimafia prosecutor's office (Direzione Nazionale Antimafia), with the contracting authority, the Chamber of Commerce, to the interforce antimafia law enforcement agency (Direzione Investigativa Antimafia), to the supervisory authority for public contracts, to the Antitrust Authority, to the Ministry of Transport and the Ministry of Economic Development, and to the Income Revenue Authority.<sup>65</sup>

The prefect must issue antimafia information within 45 days but has the option of extending this deadline for a further thirty days if complex checks are necessary.<sup>66</sup> The antimafia information expires after twelve months. Any changes in a company must be communicated within thirty days, however.<sup>67</sup> If the prefect does not issue antimafia information before the deadline, the subjects can participate in the procurement or be granted licenses and authorizations. However, if impediments are detected after the deadline passes, the grant, funding, concession etc. is revoked, even if the contract has already been concluded. Revocation excludes any activities already conducted, with the contractor being reimbursed for any costs already incurred in preparing the remaining activities, in line with the contract.<sup>68</sup>

In some cases, the contracting authority has the option of contracting the company anyway, even if mafia infiltration is suspected.<sup>69</sup> According to the case law of the Italian Council of State, the highest administrative court, this is not up to the contracting authority.<sup>70</sup> The contract can only remain in place if specific conditions apply, namely:<sup>71</sup>

- if the work is still under way;
- if the supply of goods and services is considered essential (in the public interest);
- if the supplier cannot be replaced immediately

64 Article 93, paragraph 1 of the Antimafia Code.

65 Article 91, paragraph 7bis of the Antimafia Code

66 Article 92, paragraphs 1 and 2 of the Antimafia Code.

67 Article 86, paragraph 3 of the Antimafia Code.

68 According to Article 92, paragraph 3, Article 83 paragraph 1 and 2 of the Antimafia Code.

69 Article 83 paragraph 1 and 2 of the Antimafia Code.

70 See Section 7.2.1 of this chapter.

71 Article 94 paragraph 3 of the Antimafia Code.

This option is therefore subject to particularly strict requirements, including detailed reasons as to why the contracting authority has decided to continue working with the contractor in question.<sup>72</sup>

There used to be a third category of antimafia information: ‘atypical antimafia information’.<sup>73</sup> Again, the prefect issued this type of antimafia documentation. The aim was to identify attempts at mafia infiltration into companies. The contracting authority had the discretionary power to decide whether the contract with the subject involved mafia infiltration.<sup>74</sup> Atypical information was therefore not an administrative act with prescribed consequences. Its aim was to give public administrators information about tenderers. However, this system was criticized because it allowed the contracting authority to make decisions regarding mafia infiltration into companies without having the legal authority to do so.<sup>75</sup> The Antimafia Code does not include atypical antimafia information.<sup>76</sup>

### 7.2.1.3 Self-certification

For contracts requiring an antimafia communication, there is a self-certification system with the purpose of simplifying and streamlining the procedure for the enterprises. For contracts requiring antimafia information, self-certification is not allowed.<sup>77</sup> The self-certification system allows a subject to attest to the absence of impediments as provided for in Article 67 of the Antimafia Code. Article 89 lists the situations in which self-certification is allowed:

- for the conclusion of urgent contracts and their renewal (for service provider contracts);
- for private activities subject to the administrative instrument of self-declaration at the start of the work (by the private subject for the administrative authority);
- for private activities subject to the administrative instrument of tacit approval.<sup>78</sup>

In these cases, the contracting authorities and public authorities can acquire antimafia self-certification from natural and legal persons. At a later stage, this documentation can

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72 Malagnino 2011. See also Cons. di Stato, Section. V, no. 4467 of 9 September 2013.

73 Article 10 paragraph 9 of Decree of the President of the Republic no. 252 of 1998, Article 1 *septies* of Legislative Decree no. 629 of 1982 and Law no. 726/1982.

74 Zamberletti 2008.

75 Malagnino 2011. See also: Cons. di Stato, Section III, no. 5177/2012; Cons. di Stato, Section III, no. 3247/2012; T.A.R. Abruzzo, Section. I, no. 870/2010; Cons. di Stato, Section. V, no. 5247/2005; Cons. di Stato, Section IV, 1 March 2001, no. 1148; Cons. di Stato, Section VI, 17 April 2009, no. 233; Cons. di Stato, Section V, 31 December 2007, no. 6902; T.A.R. Campania Napoli, Section I, 23 January 2007, no. 596; T.A.R. Catania, Section. IV, no. 941/2009; Cons. di Stato, Section. VI, no. 1948/2007; Cons. di Stato, Section. IV, no. 1148/2001; T.A.R. Sicilia Palermo, no. 1479/2009; T.A.R. Calabria, Reggio Calabria, no. 197/2007; Cons. di Stato, Section V, no. 4135/2006; Cons. di Stato, Section. IV, no. 3491/2009; Cons. di Stato, III, 14 September 2011, no. 5130 and Section VI, 28 April 2010, no. 2441.

76 Article 91 of the Antimafia Code.

77 Article 89 of the Antimafia Code.

78 According to Decree of the President of the Republic no. 300 of 26 April 1992.

be sent to the competent Prefecture. The self-certification document has to be signed according to Article 38 of the Decree of the President of the Republic no. 445/2000, as the subject is responsible for what he has declared. The public administrators can check the trustworthiness of the declarations. In case of false information, they can inform the competent authority (such as the Prosecutor's Office).<sup>79</sup>

The introduction of the new Antimafia Code has extended the possibilities for self-certification. In the past, service contracts were excluded from this system. Due to its efficiency, self-certification is widespread in Italy. It is presently required to open new public commercial activities, such as bars, pizzerias and hotels.

### 7.2.2 *Other screening and/or monitoring procedures*

Legislation aimed at ensuring the transparency of public contracting prohibits negotiation with subjects targeted by preventive measures. Specifically, this includes:

- The code of public contracts. Article 38 paragraph 1 under b of the Public Contracts Code sets out general requirements for contracting with the administrative authorities. Under b and c, the Code states that persons subject to a preventive measure or convicted of participating in an organized crime group are banned from contracting with administrative authorities; this prohibition is also set out in Article 247 of the Antimafia Code.<sup>80</sup>
- The Antimafia Code states that public authorities<sup>81</sup> cannot award licences, permits, concessions, subsidies, benefits for mafia victims or authorizations, or accept or award tenders, or approve or allow various contracts, including tender contracts, if there are impediments or mafia attempts to infiltrate companies (Article 67 and Article 94, paragraph 1, of the Antimafia Code).<sup>82</sup>

In particular, subjects who have a preventive measure imposed on them or who are convicted of offences listed in Article 51, paragraph 3*bis* of the Italian Criminal Procedure Code, cannot obtain:<sup>83</sup>

<sup>79</sup> Article 75 and 76 of Decree of the President of the Republic 445/2000.

<sup>80</sup> According to Article 38 paragraph 1 of Legislative Decree no. 163 of 12 April 2006 and Article 45 paragraph 1 of Directive 2004/18/EC. See also: T.A.R. Campania Napoli, no. 5058/2009; Cons. di Stato, Section. VI, number 4574/2006; Cons. di Stato, no. 5780/2008; Constitutional Court, number 25/2002; Cons. di Stato, Section. V, 27 June 2006, no. 4135; Cons. di Stato, Section V, 29 August 2005, no. 4408; T.A.R. Calabria Catanzaro, Section II, 12 February 2007, no. 38; Cons. di Stato, Section VI, 11 December 2009, no. 7777; T.A.R. Lazio, no. 8434 of 24 September 2013; T.A.R. Calabria Catanzaro, Section I, 2011, no. 1334; Cons. di Stato, Section I, number. 477/2012.

<sup>81</sup> According to Article 83 Antimafia Code.

<sup>82</sup> See Sections 7.2.1 and 7.2.2; according to Article 94 of the Antimafia Code, and Article 11, paragraph 3, of Decree of the President of the Republic no. 252 of 1998.

<sup>83</sup> Article 67 of the Antimafia Code.

- licences or police authorizations;
- public concessions;
- concessions for public works;
- entry into a public register (i.e. the Chamber of Commerce);
- certification of their qualification to conduct public works;
- other entries into public registers or authorization proceedings to conduct entrepreneurial activities;
- public funding awarded by the State, public bodies or the European Communities for entrepreneurial activities;
- firearms licences

The final decision applying a preventive measure implies the refusal of applications for licences, authorizations, concessions, attestations, certification of qualifications, and a prohibition against contracting with the administrative authorities.<sup>84</sup>

### 7.2.3 *Legal protection of natural and legal persons subject to screening and/or monitoring*

The documents relating to the antimafia documentation system are administrative deeds. They can be challenged before an administrative judge. An administrative deed is a legal unilateral act implemented by an administrative authority. The discrepancy between a deed and its normative basis allows the subject of the deed, e.g. a licence applicant, to contest it. The deed may be of ‘faulty legitimacy’ (*vizio di legittimità*) or merit (*vizio di merito*). The legitimacy of the deed is flawed if it is not consistent with the applicable legislation (e.g. the problem of *detournement de pouvoir* or exceeding the power bestowed by legislation). The deed is of faulty merit if it conflicts with the principles and values of the Italian legal system, specifically principles provided for in the Italian Constitution, such as transparency and efficiency.

Antimafia information, which automatically prevents a natural or legal person from contracting with the administrative authorities, can cause that person direct damage. For this reason, it can be contested directly before the administrative court. If the court annuls the deed, both the measure eliminating the person’s contract from the tender and the provisions assigning the tender to another company are invalid. In other words, the decision to award the contract to another company becomes invalid and the tender procedure must be repeated.

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84 Article 67 paragraph 2 of the Antimafia Code.



### 7.3 INSTRUMENTS DIRECTED AT PREVENTING THE DISTURBANCE OF PUBLIC ORDER

This section analyses the administrative measures intended to prevent the disturbance of public order. Section 7.3.1 discusses the revocation, refusal, and withdrawal of permits, licences, subsidies or government or other tenders regulated by various normative sources at the national and regional level. Section 7.3.2 examines the possibility of closing down and/or expropriating premises when public disturbance occurs in or around those premises.

#### 7.3.1 *Revoking or refusing licences, subsidies, or government or other tenders*

The authorities screen enterprises and individuals based on information provided by the applicants themselves, or gathered from financial institutions, Chambers of Commerce and government databases, including law enforcement agencies.<sup>85</sup> If it turns out that a Criminal Court has barred a person suspected or convicted of being linked to organized crime from contracting with the administrative authorities, or that enterprises or corporations bidding on a contract are suspected of having been infiltrated by organized crime groups, the authorities cannot conclude a public contract or grant any kind of licence, or financial contribution to such enterprises or corporations. According to Article 11 of the Consolidated Law of Public Security (also known as TULPS), licences must also be denied to people sentenced to more than three years of imprisonment.<sup>86</sup> This is a general provision which preceded the antimafia legislation and to some extent overlaps with it, although the TULPS is broader.

The provincial head of the State Police (*Questore*) may also suspend a licence for commercial activity if the property concerned is a usual hangout for criminals or people known to pose a risk to society. This measure can also be applied if the location poses a risk to public safety or public order.<sup>87</sup>

As a government official, the mayor of a municipality (*comuni*) supervises public order and security and passes information to the prefect.<sup>88</sup> By issuing motivated deeds and acting in accordance with general principles of the legal system, the mayor may implement urgent measures to prevent serious risks to public safety. He can also order the prefect to intervene

<sup>85</sup> See Section 7.2.1 of this chapter.

<sup>86</sup> According to Articles 11 to 14 of Royal Decree no. 773 of 18 June 1931, *Testo unico delle Leggi di Pubblica Sicurezza* (Consolidated Public Security Laws, also known as TULPS). This decree focuses on the protection of the public order, while the antimafia documentation system (Section 7.2.1) focuses on prevention in the public administration contracting system.

<sup>87</sup> Article 100, paragraph 1 of Royal Decree no. 773/1931. An example is a place that has been the scene of rioting or serious public disorder. See also: T.A.R. Lombardia, sentence no. 69 of 13 February 2008.

<sup>88</sup> According to Article 54 of Legislative Decree no. 267 of 18 August 2000.

with the help of law enforcement agencies.<sup>89</sup> As mentioned in Section 7.2.1, the prefect ensures the coordination of administrative activities. In order to enforce the mayor's actions, the prefect has the power to adopt appropriate measures (on the mayor's behalf). He can perform inspections to check the regular functioning of services placed under mayor's competence and guarantee law enforcement's activities.<sup>90</sup>

### 7.3.2 *Closure and/or expropriation of premises*

If a commercial activity's licence has been suspended multiple times, the Questore can decide to close down the premises indefinitely.<sup>91</sup> The owner of the premises is not entitled to any kind of compensation or financial contribution from the administrative authorities.<sup>92</sup>

## 7.4 SEIZURE AND CONFISCATION OF ASSETS

Italy has developed a complex system of seizure and confiscation. The legislation aims to tackle the financial resources of organized crime.<sup>93</sup> The Italian system recognizes four types of confiscation:

1. criminal confiscation (Article 240 and Article 416*bis* paragraph 7 of the Italian Criminal Code);
2. extended confiscation (Article 12*sexies* of Legislative Decree 306/92);
3. preventive seizure and confiscation (Article 24 of the Antimafia Code);
4. equivalent confiscation (Article 25 of the Antimafia Code).

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<sup>89</sup> Article 54, paragraph 4 of Legislative Decree no. 267/2000.

<sup>90</sup> According to Article 54, paragraph 9 of Legislative Decree no. 267 of 18 August 2000, *Testo unico delle leggi sull'ordinamento degli enti locali*, also known as the Consolidated Law on Local Public Bodies, TUEL; updated by Legislative Decree no. 187 of 12 November 2010.

<sup>91</sup> Article 100, paragraph 2 of Royal Decree no. 773/1931. See also: T.A.R. Toscana, sentence no. 258 of 31 January 2006.

<sup>92</sup> See Section 7.2.2 of this chapter. The rationale behind this procedure is to isolate people under investigation from their economic and territorial contexts.

<sup>93</sup> Transcrime 2013. Law no. 55 of 19 March 1990 provides for the confiscation of all the assets deriving from drug trafficking, extortion, usury, money laundering, and smuggling. Moreover, for the first time in Italian law this provision allows these measures (confiscation and seizure) to be applied even against straw men and counsellors.

### 7.4.1 Criminal confiscation

Criminal confiscation is regulated by Article 240 of the Criminal Code. Criminal confiscation is established beyond a reasonable doubt at the end of a criminal trial on the basis of the rule of evidence required in criminal procedures.<sup>94</sup> Specifically:

- following conviction, the court may order the confiscation of means used or intended to be used to commit a crime or make use of the product or profits of that crime;<sup>95</sup>
- profits obtained by the offender by committing the crime are mandatorily confiscated upon conviction.<sup>96</sup> This includes technical equipment used (wholly or in part) to commit cyber-crimes;<sup>97</sup>
- objects whose use, manufacture, possession or transfer is an offence in itself are mandatorily confiscated, even if a conviction has not been pronounced.<sup>98</sup>

The burden of proof for connecting the goods and the crime rests with the prosecution.<sup>99</sup>

New confiscation measures specifically related to criminal organizations have been added to traditional confiscation since the 1980s. In 1982, Law no. 646 added Article 416*bis* to the Italian Criminal Code, which criminalizes participation in a mafia-type organization. Paragraph 7 contains more specific rules on the confiscation of goods owned by members of organized crime groups.<sup>100</sup> In this case, the means used or intended to be used to commit the crime and the price (e.g. the payment for a murder), products and proceeds of the crime are confiscated mandatorily.<sup>101</sup> The procedure requires evidence of a link between the confiscated assets and the offence. All the confiscation measures enacted within criminal proceedings can give rise to seizure. According to Article 321 paragraph 2 of the Code of Criminal Procedure, ‘the court may also order the seizure of items subject to confiscation’.<sup>102</sup>

94 Italian Criminal Code, Article 240.

95 Article 240, paragraph 1 of the Criminal Code.

96 Article 240, paragraph 2 no. 1 of the Criminal Code.

97 Article 240, paragraph 2, no. 1*bis* of the Criminal Code. Listed in Articles 615*ter*, 615*quater*, 615*quinquies*, 617*bis*, 617*ter*, 617*quater*, 617*quinquies*, 617*sexies*, 635*bis*, 635*ter*, 635*quater*, 635*quinquies*, 640*ter* and 640*quinquies* of the Italian Criminal Code Law no. 12 of 15 February 2012, Article 240 paragraph 2 (updated) of the Criminal Code.

98 Article 240 paragraph 2 under 2 of the Criminal Code.

99 Maugeri 2008; Menditto 2011.

100 Law no. 646/1982 significantly amended Law no. 575/1965. Article 2 of Law no. 575 extended the precautionary measures of special surveillance for public security and obligatory residence to persons suspected of participating in a criminal organization. These measures already applied to persons who pose a risk to society under Law no. 1423/1956.

101 UNICRI & BASCAP 2013.

102 Article 35 paragraph 5 of the Antimafia Code states that, when ordering the seizure of assets, the court must appoint a judge and an administrator who is chosen from a special registry. The administrator is tasked with the custody, conservation and administration of seized assets, and with increasing their value if possible. Within thirty days of the appointment, the administrator must submit a detailed report to the judge about

#### 7.4.2 *Extended confiscation*

The extended confiscation system was introduced in 1994 by Legislative Decree 399/1994 and Law 501/1994, which added article 12*sexies* to Law 356/1992.<sup>103</sup> The extended confiscation of illegally obtained assets is imposed on persons convicted for offences typically related to the activity of criminal groups. Thanks to the reversal of the prosecutor's burden of proof, assets at the disposal of the convicted person and disproportionate to his income may be confiscated. The extended system makes it possible to confiscate assets whether or not they have criminal origins. The procedure does not require any proof of a connection between criminal behaviour and the assets in question.

In practice, extended confiscation is applied if the person is unable to prove the lawful origin of his assets or property and the court is authorized to confiscate them. The prosecutor is not required to prove that the person has committed a specific offence or to demonstrate a link between the assets and a specific crime.<sup>104</sup>

#### 7.4.3 *Preventive seizure and confiscation*

The Italian legal system provides for a special preventive form of seizure and confiscation that permits seizure and confiscation as administrative and preventive measures. Such measures are non-conviction based, administrative in nature and enforced outside criminal proceedings by law enforcement authorities under judicial supervision and less strict rules of evidence.<sup>105</sup>

According to Article 20 of the Antimafia Code, goods in direct or indirect control of the accused person are seized when there is a disparity between the goods' value and the income of the person concerned, or sufficient evidence that the assets are the proceeds of crime. The accused person loses control of the goods seized, and a judicial administrator, appointed by the court, administers the assets. Preventive seizure may be applied before the hearing pertaining to the confiscation.<sup>106</sup> This happens when goods are in danger of disappearing, being misappropriated or transferred.<sup>107</sup> Urgent seizure may be used when

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the seized assets, including their listing, conditions, estimated value, any third-party rights and preferred management options.

<sup>103</sup> Article 12*sexies* of Legislative Decree no. 306/1992, amended to Law no. 356/1992, has been introduced by Legislative Decree no. 399/1994 (amended to Law no. 501/1994). The Constitutional Court abrogated former article 12*quinquies* paragraph 2 of Law no. 356 of 1992, declaring it unconstitutional in light of Article 27 of the Italian Constitution (principle of non-guilt).

<sup>104</sup> Maugeri 2008; Menditto 2011.

<sup>105</sup> Menditto 2011.

<sup>106</sup> Article 24 of the Antimafia Code.

<sup>107</sup> Article 22, paragraph 1 of the Antimafia Code.

assets are in serious danger of disappearing, being misappropriated or transferred.<sup>108</sup> Seizure can be applied after imposing a preventative personal measure.<sup>109</sup> According to Article 24 of the Antimafia Code, preventive confiscation can be ordered:

- if the owner of the goods subject to the preventive proceedings is unable to prove their lawful origin;
- if the subject's declared income is disproportionate to his real economic activities;
- if there is evidence suggesting that the goods are of illegal origin.

The applicable legislation allows for personal and patrimonial measures to be applied separately. Patrimonial measures can be adopted independently of the risk that the subject poses to society.<sup>110</sup> The current regulation concerning evidence of guilt and proof of disproportionate value of the assets are sufficient to justify preventive confiscation when the persons concerned are suspected of being in contact with organized crime groups.<sup>111</sup>

#### 7.4.4 *Equivalent confiscation*

Last, Article 25 of the Antimafia Code allows for the seizure and confiscation of assets of equivalent value if a person is the subject of a preventive measure and he:

- misappropriates, hides or devalues goods in order to elude seizure or confiscation measures;
- has transferred the assets in good faith to third parties

The rationale behind this provision is to guarantee the confiscation of illicit revenues in any possible way.<sup>112</sup>

<sup>108</sup> Article 22, paragraph 2, of the Antimafia Code.

<sup>109</sup> Article 24, paragraph 3, of the Antimafia Code.

<sup>110</sup> Article 18 of the Antimafia Code.

<sup>111</sup> Originally, confiscation was used to obtain assets at the disposal of subjects deemed a risk to society. The confiscation system was applied if the income a person declared on his tax statement was disproportionate to his legitimate activities. In time, with the introduction of Legislative Decree 92/2008, Law 125/2008 and Law 94/2009, the confiscation system was used even for persons not considered a risk to society. Investigators look not only at the financial assets of suspected criminals themselves, but also at the assets of their spouses, children and domestic partners for a period of five years. Furthermore, any natural or legal persons, companies, or associations at the direct or indirect disposal of the criminal are subject to investigation.

<sup>112</sup> According to Legislative Decree no. 92 of 2008, Article 2<sup>ter</sup> paragraph 10. See also: Cass., Section UU, 3 July 1996; Cass., 11 June 2008 no. 25676; Cass., Section UU, 8 January 2007, no 57; Cass., 4 July 2007, number 33479 and Cass., 15 June 2005, number 27433.

## 7.5 THE DISSOLUTION OF LOCAL ADMINISTRATIONS OWING TO MAFIA INFILTRATION

This section addresses another administrative measure meant to combat the mafia. It allows for the dissolution of municipal or provincial councils and its replacement by a panel of three commissioners.<sup>113</sup> The measure aims to eradicate relationships between local politics and the mafias and to ensure the impartiality, efficiency, efficacy, and transparency of the public administration.<sup>114</sup>

Article 143 of Legislative Decree 267/2000 allows for the dissolution of municipal and provincial councils and the suspension or dismissal of the mayor and provincial presidents. Article 146 extends this measure to consortia of municipalities or provinces, local units of the National Health Service, and other publicly owned companies.

The competent prefect initiates the procedure. It appoints a three-member committee to conduct an enquiry if actual, unequivocal, and relevant indicators reveal a relationship between members of the city council and the mafias or when there are influences that compromise the independence of public administration.<sup>115</sup> The committee must assess the coexistence of various elements in order to establish whether a city council should be dissolved. Specifically, it must review all the main aspects of the local administration. The committee delivers a written report to the prefect within the deadline of three months (extendable by a maximum of three further months)<sup>116</sup> The prefect submits a report to the Minister of the Interior regarding the existence of actual, unequivocal, and relevant indicators of mafia infiltration within 45 days and after consultation of local police and prosecution authorities.<sup>117</sup> The Minister of Interior can propose to the Government (the Council of Ministers) the dissolution of the concerned local authority. The dissolution decree is then issued by the President of the Republic within three months of the Council of Ministers' decision.<sup>118</sup>

The dissolution of the city council implies the dismissal of the mayor or the provincial president, of the city's or province's council and government and of any other person connected to the mentioned positions.<sup>119</sup> The local administrators responsible for the conducts leading to the dissolution are barred from re-election at local elections once a

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113 Ramacci & Spangher 2010. The city council represents the local assembly (Article 37 of Legislative Decree no. 267 of the 18 August 2000).

114 Mete 2009. According to Article 97 of the Italian Constitution. Article 114 defines municipalities (*comuni*) as local governments with statutes, financial autonomy, and legislative power with regard to their administrative functions. City councils are elected and serve a five-year term (Article 51 paragraph 1 of Legislative Decree no. 267 of 18 August 2000).

115 Article 143, paragraph 2 of Legislative Decree 267/2000.

116 Commissione parlamentare d'inchiesta sul fenomeno della criminalità organizzata mafiosa o similare 2005.

117 Article 143, paragraph 3 of Legislative Decree 267/2000.

118 Article 143, paragraph 4 of Legislative Decree 267/2000.

119 Article 143, paragraph 4 and 6 of Legislative Decree 267/2000.

definitive provision has been issued against them.<sup>120</sup> The prosecution may be informed of any relevant conduct emerged during the enquiry and this may trigger the application of preventive measures.<sup>121</sup>

A decree of the Minister of Interior, upon the prefect's proposal, may adopt any useful measure to avoid any dangerous situation in relation to the managers, directors and any other employee of the local administration (e.g. suspension, transfer, etc.). This decree can be issued also if the local administration is not dissolved after the prefect's enquiry.<sup>122</sup>

An extraordinary commission of three members (public officials or members of the judiciary) is appointed in the dissolution decree. The dissolution lasts between 12 and 18 months (extendable to a maximum of 24 months). The extraordinary commission manages the local administration during this time until the next elections.<sup>123</sup> To tackle the main risks and carry out public contracts, the extraordinary panel must adopt a priority plan setting out the necessary measures within sixty days of commencing its assignment.<sup>124</sup> For the five years following the dissolution, the local authority must acquire the *informazione Antimafia* for any public procurement contract, subcontract or concession, independently from the size of the contract.

There are a number of indicators of mafia infiltration into a city council, including negative management of its administration, malfunctioning of public services; in particular tenders awarded for waste management, building projects, or concessions, permits and licences representing very sensitive areas.<sup>125</sup> The Constitutional Court has ruled that the dissolution of city councils is in line with the Constitution.<sup>126</sup> As an *obiter dictum*, the Court reasoned that this measure has a preventive effect and does not require the same standard of proof as criminal proceedings.<sup>127</sup>

There are currently nine regions in Italy in which this kind of administrative measure has been applied.<sup>128</sup> Although this procedure is only used in extreme cases, it is an indicator for measuring the presence of organized crime groups.<sup>129</sup>

120 Article 143, paragraph 11 of Legislative Decree 267/2000.

121 Article 143, paragraph 8 of Legislative Decree 267/2000.

122 Article 143, paragraph 5 of Legislative Decree 267/2000.

123 Article 144, paragraph 1 of Legislative Decree 267/2000.

124 Article 145, paragraph 2 of Legislative Decree 267/2000.

125 (For a database of the dissolved administrations, see: Comuni sciolti s.l.n.d.

126 The Italian Constitutional Court, judgment no. 103/1993.

127 See also: T.A.R. Lazio Roma, Section I, 1 July 2013, no. 6492; Cons. di Stato, IV, 6 April 2005, no. 1573; Cons. di Stato, Section V, 22 March 1998, no. 319; Cons. di Stato, Section VI, 24 April 2009, no. 2615; Cons. di Stato, 6 April 2005, no. 1573; Cons. di Stato, Section IV, 10 March 2011, no. 1547. Constitutional Court 19 March 1993, no. 103; Cons. di Stato, Section IV, 10 March 2011, no. 1547.

128 Sicilia, Campania, Calabria, Puglia, Basilicata, Lazio, Liguria, Piemonte and Lombardia.

129 La Spina 2008.

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## 8 THE ADMINISTRATIVE APPROACH IN THE NETHERLANDS

*M. Peters & A.C.M Spapens*

### 8.1 INTRODUCTION

#### 8.1.1 Background

The authorities in the Netherlands often utilize administrative laws to curb different types of crime, often in combination with penal and fiscal instruments. Administrative measures are frequently used to deny criminals access to public services that are essential for specific criminal enterprises.<sup>1</sup> Criminals can for instance misuse a licence for a bar or a gambling arcade to launder the illegal assets obtained through other criminal activities. A permit for a discotheque may be misused to sell illicit drugs, and a licence for a prostitution business to exploit women for sexual purposes. The danger is that criminals will infiltrate and corrupt public authorities and public bodies in order to acquire licences and other services that they require for their criminal activities.<sup>2</sup> To prevent this, the Dutch government believes that public authorities must apply administrative instruments in tandem with traditional criminal law enforcement measures.<sup>3</sup> This country report focuses on the following main question:

*Which administrative instruments are used in the Netherlands to prevent serious and organized criminals from using (and misusing) the public services that they require to undertake specific illegal activities ('administrative approach')?*<sup>4</sup>

This report served as a example for the authors of the other legal country reports, both substantially and procedurally. Hence, the report was finalised during the timeframe of research project, in July 2013. Thereafter, the authors have strived to include new developments in the Netherlands in the report.

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1 Van Daele et al. 2010, p. 20.

2 Van Daele et al. 2010, p. 20.

3 Van Daele et al. 2010, p. 20-21.

4 The reader should bear in mind that the primary purpose of the instruments described below is usually not the prevention of crime.

The report is structured as followed. Section 8.2 discusses the instruments that give the administrative authorities the tools they need to screen and monitor applicants for licences. Section 8.3 addresses the instruments directed at preventing the disturbance of public order. Finally, Section 8.4 briefly discusses the seizure of assets by the administrative authorities. For each instrument, we devote a separate subsection to the question of how other public bodies can share information with the administrative authorities and to the legal protection offered to the parties concerned. Before discussing the instruments themselves, we begin with a brief summary of the history of the administrative approach to serious and organized crime in the Netherlands.

### 8.1.2 *Historical background in the Netherlands*

In the early 1980s, registered crime in the Netherlands quadrupled.<sup>5</sup> The Dutch government responded in 1985 by issuing the Society and Crime (*Samenleving en criminaliteit*) policy,<sup>6</sup> which also pointed out the threat of organized crime to society and the risks of it infiltrating into the legal economy.<sup>7</sup> The government proposed two tracks. The first focused on increasing the effectiveness of law enforcement and the repression of illegal activities. The second track aimed to develop preventive measures.<sup>8</sup>

In the second half of the 1980s, the emergence of ‘Dutch style’ organized crime increasingly worried the authorities, particularly in Amsterdam. Criminal groups had grown wealthy importing and exporting narcotic drugs and had started to invest their money in legitimate businesses and property, for instance in the Amsterdam Red Light District. The Dutch were very interested in the methods used in the United States to fight the Italian-American mafia, and this interest led to the *Dutch-American Conference on Organized Crime* in 1990.<sup>9</sup> This conference was critical to policymaking against organized crime in the Netherlands,<sup>10</sup> in part because the US experiences had made clear that, alongside law enforcement agencies, local government played a vital role.<sup>11</sup>

A second important influence on the development of the administrative approach in the Netherlands was the ‘IRT affair’,<sup>12</sup> which came to a climax in 1993 when a special investigation squad mounted to combat the ‘Dutch networks’ was disbanded. The direct

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5 Van Daele et al. 2010, p. 15; Huisman et al. 2005, p. 2-8.

6 *Kamerstukken II* 1984-1985, 18995, nrs. 1-2.

7 Van Daele et al. 2010, p. 15.

8 Van Daele et al. 2010, p. 15.

9 Van Daele et al. 2010, p. 16-17.

10 Van Daele et al. 2010, p. 16-17.

11 Van Daele et al. 2010, p. 16.

12 The *Interregionale recherche teams* (IRT) were special investigation squads mounted especially to investigate organized crime. There were seven teams, which were integrated into the National Criminal Investigation Squad (*Nationale Recherche*) in 2004.

reason was a covert operation in which the police had allowed a criminal to bring large amounts of narcotic drugs into the country. The aim was to allow this criminal to establish connections with persons whom the police suspected of being the top organized crime bosses in the Netherlands. The operation ran for several years without success. The IRT affair – particularly the fact that the informer had been allowed to smuggle large amounts of narcotic drugs into the country with the aid of the police and sell them afterwards – led to a public outcry and suspicions of police corruption. It resulted in a parliamentary enquiry by the Van Traa Commission, which reported in 1996.

The affair clearly pointed out two problems. The first was that the police had assumed that Dutch-style organized crime consisted of large, well-organized and hierarchically structured syndicates. In practice, it was a network of relatively small groups who engaged in criminal projects in ever-shifting coalitions. The infiltration operation had been doomed from the start, simply because there was no ‘end-boss’.

Second, the IRT affair made clear that the police and the public prosecution service lacked a transparent legal framework for applying special investigative methods. This was one of the main conclusions of the parliamentary enquiry in 1996. It led to the Special Powers of Investigation Act (*Wet op de Bijzondere Opsporingsbevoegdheden*), which was adopted in 2000.

The IRT affair not only had a major effect on criminal procedural law and policy, but also on complementary approaches to serious and organized crime. In its final report,<sup>13</sup> the Van Traa Commission concluded that criminals make use of legal means in order to enhance and broaden their criminal activities.<sup>14</sup> According to the Commission, several sectors are particularly vulnerable.<sup>15</sup> These sectors include bars and restaurants, hotels, gambling, real estate and road transport.<sup>16</sup>

In 1997, the City of Amsterdam was the first to establish a ‘Van Traa Team’, a team of civil servants charged with preventing criminals from obtaining licences to operate a legitimate business in the city.<sup>17</sup> The team had to base its interventions mainly on the general municipal by-law (*Algemene Plaatselijke Verordening*, APV), which we will discuss further in Section 8.3.3. In 2003, the Public Administration (Probity Screening) Act (*Wet bevordering integriteitsbeoordelingen door het openbaar bestuur*, BIBOB Act) substantially extended the legal framework. The BIBOB Act made it easier for local authorities to check applicants’ criminal and tax records. Even criminal connections and a lack of transparency in financial matters are now sufficient grounds to refuse a licence or to withdraw it. The

<sup>13</sup> *Kamerstukken II* 1995/96, 24072, nr. 10 and 11.

<sup>14</sup> De Moor-van Vught 2012, p. 65-76.

<sup>15</sup> De Moor-van Vught 2012, p. 65-76.

<sup>16</sup> *Kamerstukken II* 1995/96, 24072, nr. 10 and 11, p. 60.

<sup>17</sup> It was named the Van Traa Team in honour of the president of the parliamentary commission, who had perished in a car accident in 1997.

BIBOB Act covers several types of high-risk business, such as gambling arcades, coffee shops, bars and restaurants (including fast food), and the sex business.<sup>18</sup>

In 2007, Amsterdam launched the Emergo project as a multi-agency approach to serious and organized crime (e.g. exploitation, narcotic drugs, money laundering) in the Red Light District.<sup>19</sup> Emergo involves cooperation between the police, the public prosecution service, the municipal authorities (including the Van Traa Team) and the Tax and Customs Administration. The government adopted the Administrative Approach to Organized Crime (*Bestuurlijke Aanpak Georganiseerde Misdaad*) programme in 2008.<sup>20</sup> One outcome of this programme was the establishment of Regional information and Expertise Centres (*Regionale Informatie- en Expertise Centra*, RIECs) all over the country. The ten RIECs are to a large extent modelled on the Emergo project: the centres analyse particular crime problems based on information shared by the partners and then coordinate responses by the different public authorities. The current government policy programme, Safety begins with Prevention (*Veiligheid begint bij Voorkomen*),<sup>21</sup> has the administrative approach to organized crime as one of its three pillars, including the effective application of the BIBOB Act and other administrative instruments.<sup>22</sup> This approach aims to hamper serious and organized crime by means of interventions at the local, regional and national levels.<sup>23</sup>

Although much has been achieved in the past two decades when it comes to using administrative instruments against serious and organized criminal activities, it must be noted that the government still finds it necessary to popularize the concept further. In particular, the mayors of small and rural communities often find it hard to believe that organized criminals might find their towns and villages an attractive place to start up a business. They may also think that tackling serious and organized crime is solely a law enforcement activity. Amsterdam and some other regions, such as the Meuse-Rhine Euroregion and more recently the five largest towns in the Province of Noord-Brabant, are to some extent still in the vanguard in applying the BIBOB Act and other administrative instruments.

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18 Prostitution was legalized in the Netherlands in 2000. The sale of hashish and marihuana in coffee shops is illegal but not prosecuted based on the expediency principle, and can therefore not be licensed. Coffee shop operators do however require a licence under the Alcohol Licensing and Catering Act (*Drank- en Horecawet*).

19 Project Emergo, 2011.

20 *Kamerstukken II* 2007-2008 29911, nr. 11, p. 5ff.

21 *Kamerstukken II* 2006/2007, 28684, nr. 119.

22 Ministerie van Binnenlandse Zaken en Koninkrijksrelaties & Ministerie van Justitie 2008.

23 Ministerie van Binnenlandse Zaken en Koninkrijksrelaties & Ministerie van Justitie 2008, p. 5; Meerdinkveldboom & Terpstra 2010, p. 8.

## 8.2 SCREENING AND MONITORING

As mentioned above, the Dutch government has provided administrative authorities with several tools to screen and monitor natural persons and legal entities. This section focuses on the instruments entailing:

*the preventive screening and monitoring of applicants (persons and legal entities) for permits, tenders and subsidies.*

Section 8.2.1 addresses the *Verklaring omtrent het Gedrag* (VOG). Section 8.2.2 presents an in-depth analysis of the BIBOB legislation. Finally, Section 8.2.3 discusses the *Wet controle op rechtspersonen* (Wcp). With regard to each instrument, we also provide a separate overview of the sources of information the administrative authorities may access and how information is exchanged.

Before we turn to discussing the available administrative instruments, we must briefly address the General Administrative Law Act (*Algemene wet bestuursrecht*, Awb). This Act was adopted in 1992 and regulates general administrative procedure for all other administrative laws, as well as legal protection against administrative decisions.<sup>24</sup> This implies that the Awb procedure is applicable to all of the instruments discussed hereafter. However, more specialized administrative laws may deviate from the Awb regime.<sup>25</sup> Furthermore, the Awb comprises several specific administrative enforcement instruments, which we will address in Section 8.3.

We must also briefly discuss the legal protection procedure under the Awb. Whenever an administrative authority takes a decision, any person mentioned in the refusal or revocation ordinance becomes a *belanghebbende*, or interested party (Article 4:8 Awb). Such a party can object to an ordinance that he considers harmful to his interests. This objection must be in writing and addressed to the administrative authority who took the decision.<sup>26</sup> If the administrative authority is unwilling to revise its decision, the interested party can lodge an appeal with the court of first instance.<sup>27</sup> The court of first instance only reviews the decision of the administrative authority with respect to procedure, i.e. whether the procedures were followed correctly.<sup>28</sup> The interested party may appeal against a decision of the court of first instance with the Administrative Law Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*, ABRvS).

<sup>24</sup> PG-Awb I, p. 64ff.

<sup>25</sup> PG-Awb I, p. 64ff.

<sup>26</sup> Van Daele et al. 2010, p. 136.

<sup>27</sup> Van Daele et al. 2010, p. 136.

<sup>28</sup> Van Daele et al. 2010, p. 136.

### 8.2.1 Verklaring Omtrent het Gedrag (VOG)

The first screening instrument available to the administrative authorities that we will discuss here is the *Verklaring Omtrent het Gedrag* (VOG). Translated, this means ‘certificate of good conduct’ and it may be required from a person or a legal entity.<sup>29</sup> The relevant legislation concerns Articles 28 to 39 of the Judicial Data and Criminal Records Act (*Wet justitiële en strafvorderlijke gegevens*, Wjsg). Submission of a VOG is a common requirement for persons applying for a job with a public authority, but also for a range of other positions in which persons with certain criminal backgrounds would present a risk. An example is a convicted paedophile who applies for a job at a day care centre for children. The VOG is also requested from people that want to join a rifle club.<sup>30</sup>

An application for a VOG is filed with the municipality where the applicant resides or on the webpage of *Dienst Justis*.<sup>31</sup> Dienst Justis, more specifically its COVOG unit (*Centraal Orgaan Verklaringen Omtrent het Gedrag*), is part of the Ministry of Security and Justice (*Veiligheid en Justitie*). It performs the actual screening<sup>32</sup> and issues the certificate. It is a simple statement of non-objection to a person or legal entity.<sup>33</sup>

If there are objections against a person or legal entity, the Ministry will refuse the VOG based on the risk the person poses to society should he or she repeat the offence, encompassed in Article 35 Wjsg.<sup>34</sup> The objections must be relevant to the position for which the VOG was requested.<sup>35</sup> For instance, an applicant for a position as a taxi driver who has been repeatedly sentenced for drink driving, or someone who wants to be an accountant and was recently convicted in a major fraud case will be refused a VOG. However, if the person who wants to start an accountancy firm has a drink driving record, he will – in principle – be granted a VOG.<sup>36</sup> If the authorities refuse the VOG, the applicant can lodge an objection in line with the Awb, and he can also subsequently appeal a negative decision concerning that objection.<sup>37</sup>

#### Screening: information sources and procedure

The COVOG determines whether a request for a VOG is admissible based on Article 30 Wjsg. A request is admissible if the applicant filed it according to the right procedure under

29 De Moor-van Vught 2012, p. 65-76.

30 Certificate of Good Conduct Brochure, via [www.justis.nl](http://www.justis.nl). For some job applications, a positive VOG is even required by law.

31 Certificate of Good Conduct Brochure, via [www.justis.nl](http://www.justis.nl). Dienst Justis is the central organ in the Ministry of Security and Justice responsible for VOGs and other certificates.

32 Staatscourant 2013, 5409, p. 1; <http://www.justis.nl/Producten/verklaringomtrengedrag/>.

33 Staatscourant 2013, 5409, p. 1; <http://www.justis.nl/Producten/verklaringomtrengedrag/>.

34 De Moor-van Vught 2012, p. 65-76.

35 De Moor-van Vught 2012, p. 65-76.

36 Certificate of Good Conduct Brochure, via [www.justis.nl](http://www.justis.nl).

37 Certificate of Good Conduct Brochure, via [www.justis.nl](http://www.justis.nl).



the Awb<sup>38</sup> and if the request is necessary in order to reduce the risk to society.<sup>39</sup> The request is regarded necessary when (1) legislation makes the VOG mandatory<sup>40</sup>; (2) the VOG concerns the prolongation of or entry into a (paid or honorary) position, a visa or emigration and; (3) a legal entity asks a one-man concern to provide a VOG before entering into a business relationship.<sup>41</sup> This list is not exhaustive.<sup>42</sup> Continuous screening is possible for taxi cardholders and persons working in childcare, based on Article 22a and b of the Judicial Data and Criminal Records Decree (*Besluit justitiële en strafvorderlijke gegevens*).<sup>43</sup>

The information accessed by the COVOG is the 'judicial information' held in the Criminal Records System (*Justitieel Documentatie Systeem*, JDS), as defined in Articles 2 to 7 Wjsg. This system contains data on criminal offences involving persons and legal entities and their outcomes, i.e. decisions taken by the courts or the public prosecutor.<sup>44</sup> When screening, the COVOG will look at the specific job profile submitted by the organization that is requiring a VOG from their (prospective) employee or business relation.<sup>45</sup> A VOG will be issued if the person is not registered in the JDS. If the job applicant is registered, the risk he or she poses will be assessed, as described in Article 35 Wjsg, according to an objective criterion and a subjective criterion.<sup>46</sup> The objective criterion consists of four elements: (1) judicial information (the offence committed)<sup>47</sup>; (2) whether the offence has been repeated; (3) the risk posed to society and; (4) whether the above would constitute limitations on the applicant's proper execution of the job.<sup>48</sup> If the objective criterion throws up a red flag, the applicant may still receive a VOG if the subjective criterion has been fulfilled, i.e. that, based on the circumstances of the case, the interest of the individual weighs more heavily than the risk he poses to society.<sup>49</sup>

In addition, the COVOG may also obtain information from police criminal records (HKS) and it can ask for information from the prosecution and probation services.<sup>50</sup> The HKS also lists criminal cases in which the applicant was a suspect, whereas the JDS only

38 Title 4.1. Awb.

39 Staatscourant 2013, 5409, p. 1-2.

40 Including Article 4.2.1. of the *Wet educatie en beroepsonderwijs*; Article 2 of the *Advocatenwet* and Article 50 of the *Wet kinderopvang*, but local legislation can also make it mandatory, for instance before granting a licence to operate a business. Staatscourant 2013, 5409, p. 9.

41 Staatscourant 2013, 5409, p. 2.

42 Staatscourant 2013, 5409, p. 10.

43 Staatscourant 2013, 5409, p. 2 and 10-11.

44 Staatscourant 2013, 5409, p. 14, with the exception of acquittals, non-admissibility of the public prosecutor or the decision not to prosecute when a person was falsely marked as a suspect.

45 Staatscourant 2013, 5409, p. 27

46 Staatscourant 2013, 5409, p. 2.

47 The period of time that the COVOG reviews is determined by the particular crime committed. Staatscourant 2013, 5409, p. 2-4.

48 Staatscourant 2013, 5409, p. 2-4.

49 Staatscourant 2013, 5409, p. 5.

50 Certificate of Good Conduct Brochure, via [www.justis.nl](http://www.justis.nl).

registers actual convictions. The COVOG may request such information if it needs more background on the judicial information it is considering within the framework of the subjective criterion.<sup>51</sup>

A request for a VOG can be combined with other screening and monitoring instruments that will be discussed below.

### 8.2.2 *The BIBOB legislation*

This section describes the Dutch Public Administration (Probity Screening) Act, which we refer to hereafter as the ‘BIBOB Act.’ The BIBOB Act enables the administrative authorities to refuse or revoke permits as well as tenders and subsidies funded by the government if screening required by the Act has a negative outcome.<sup>52</sup> The aim of the BIBOB Act is to prevent public authorities from unintentionally facilitating criminal offences by granting permits, licences, tenders or subsidies. The BIBOB Act therefore gives public authorities an instrument with which to protect their integrity. BIBOB screening has both a repressive and preventive aspect.<sup>53</sup> The screening is repressive if ‘a suspicion arises that criminal offences are being committed’ and the authorities consequentially revoke a permit, tender or subsidy. It is preventive if the authorities refuse to grant a permit, tender or subsidy because of the ‘serious risk that it will be used to commit or facilitate criminal offences.’ We will elaborate on the substantive elements of the BIBOB Act below. When compared to VOG vetting, BIBOB screening is both more comprehensive and limited in its application. It is more comprehensive because the competent authorities may request all types of relevant information from the judicial authorities, the police, the Tax and Customs Administration, and private parties such as the Chamber of Commerce. Even criminal intelligence obtained from trustworthy sources is eligible in a BIBOB screening. It is more limited because it is only applicable in a restricted number of economic sectors that are deemed susceptible to criminal infiltration (see Section 8.2.2.1).

In principle, the municipalities and other administrative authorities are competent to conduct screenings before granting licences, for example. The competent authority under the BIBOB Act is Bureau BIBOB (*Landelijk Bureau BIBOB*),<sup>54</sup> a national agency that is part of Dienst Justis and resides under the Ministry of Security and Justice.<sup>55</sup> The Bureau is responsible for systematically analysing the criminal background and affiliations of applicants and, based on this analysis, for advising the administrative authorities about the risks of issuing a licence, subsidy or tender to the persons or legal entities under

51 Staatscourant 2013, 5409, p. 15.

52 Van Daele et al. 2010, p. 129-130.

53 Van Daele et al. 2010, p. 129-130.

54 Hereafter: Bureau BIBOB.

55 <http://www.justis.nl/Producten/bibob/Integriteitsbeoordelingdoorhetopenbaarbestuur/>.

scrutiny.<sup>56</sup> We will elaborate on the relationship between the local administrative authorities and Bureau BIBOB below.

The following sections address the application of the BIBOB screening to the granting of licences, subsidies and tenders respectively (Sections 8.2.2.1-8.2.2.3). Section 8.2.2.4 then discusses legal protection in cases where the authorities refuse or revoke a permit, a subsidy or a tender. Finally, Section 8.2.2.5 focuses on the screening procedure and how various public authorities can exchange information in the context of the BIBOB Act.

### 8.2.2.1 Screening of applicants for licences

In 2008, the mayor of Alkmaar refused to renew the business permits for a number of prostitution ‘windows’ in the ‘Achterdam’ area. This refusal was based on a Bureau BIBOB advice after it had examined the available information compiled from several sources. The advice itself remains undisclosed to this day. After the applicant objected and appealed to the lower court, the latter ruled that the initial advice provided insufficient information on the ‘serious risk that the permit would be misused for illegal purposes’.<sup>57</sup> After this ruling, Bureau BIBOB prepared a supplementary advice based on more information than its first one. In appeal, the Administrative Law Division of the Council of State (ABrVS) ruled that in light of the supplementary advice, the mayor had been justified in refusing the initial permit application.<sup>58,59</sup>

First of all, the BIBOB Act allows for the screening of persons and legal entities for prior criminal activities.<sup>60</sup> It covers the following licences:

- a mandatory permit for an institution or company following from a municipal ordinance;<sup>61</sup>
- a permit based on the Alcohol Licensing and Catering Act;<sup>62</sup>
- an exemption based on the Opium Act;<sup>63</sup>
- a permit based on the Road Haulage Act;<sup>64</sup>

56 Joosten, Rovers & Urff 2008, p. 33-35. See also, p. 173-194 and 267-294; *Kamerstukken II* 1999-2000 26883, nr. 3, p. 6.

57 Rechtbank Alkmaar 12 November 2009, LJN: BK2970.

58 Dienst Justis April 2012, p. 8; ABRvS 20 July, LJN: BR2279.

59 Numerous examples can be given of how the BIBOB Act is applied. According to Bureau BIBOB, the example above is one of the most complex they have ever had to deal with, taking into account the amount of information available. See Dienst Justis April 2012, p. 8.

60 De Moor-van Vught 2012, p. 65-76.

61 Article 1 paragraph 1 sub c under 1 in conjunction with Article 7 paragraph 1 BIBOB Act.

62 Article 1 paragraph 1 sub c under 2 in conjunction with Article 3 Licensing and Catering Act.

63 Article 1 paragraph 1 sub c under 3 in conjunction with Article 6 Opium Act.

64 Article 1 paragraph 1 sub c under 4 in conjunction with Article 4 paragraph 1 and 3 Road Haulage Act.

- a permit based on the Passenger Transport Act 2000;<sup>65</sup>
- a permit based on the Environmental Management Act;<sup>66</sup>
- a permit based on the Housing Act;<sup>67</sup>
- an attribution based on the Telecommunications Act.<sup>68</sup>

Moreover, on 1 July 2013, the new and consecutive *Evaluatie – en uitbreidingswet BIBOB*<sup>69</sup> came into force.<sup>70</sup> It broadened the scope of the BIBOB screening to the real-estate sector, to gambling operations and to fireworks importers.<sup>71</sup> ‘Headshops’<sup>72</sup> and public events have also been brought under the scope of the BIBOB procedure via the BIBOB Decree (*Besluit BIBOB*).<sup>73</sup> These economic activities have been included under the scope of BIBOB screening because they are thought to be vulnerable to criminal infiltration.<sup>74</sup>

Article 3 paragraph 1 BIBOB Act, allows the administrative authorities to refuse to make a requested decision or to cancel a decision that has been taken if there is a serious danger that the decision could in part be used:

- a. to make use of proceeds obtained or yet to be obtained from criminal offences that have been committed or;
- b. to commit criminal offences.

Examples of crimes that present a ‘serious danger’ are: drug trafficking, human trafficking and property crimes such as fraudulent bankruptcy, theft, fencing stolen goods, money laundering and embezzlement.<sup>75</sup> For the authorities to refuse or revoke a licence, criminal offences must have been committed (Article 3 paragraph 1 sub a) and there must be a clear connection between the licence to be granted or already granted and the criminal offences (Article 3 paragraph 1 sub b).<sup>76</sup> Additionally, based on paragraph 6 of Article 3 Act, the authorities may refuse or revoke a permit when they suspect that a criminal offence was committed to acquire the permit.<sup>77</sup>

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65 Article 1 paragraph 1 sub c under 5 in conjunction with. Article 4 paragraph Passenger Transport Act 2000.

66 Article 1 paragraph 1 sub c under 6 in conjunction with Article 8.1 Environmental Management Act.

67 Article 1 paragraph 1 sub c under 7 in conjunction with Article 40 paragraph 1 and article 61a Housing Act.

68 Article 1 paragraph 1 sub c under 8 in conjunction with Article 4.3 paragraph 3 sub b Telecommunications Act.

69 *Kamerstukken II* 2010-2011 32676, nr. 2 and 3.

70 The latest developments as of 30 January 2013 are documented in *Kamerstukken I* 2012-2013 32676, nr. G.

71 *Kamerstukken II* 2010-2011 32676, 3, p. 1.

72 A headshop sells supplies for using drugs, such as cigarette papers, water pipes etc.

73 *Besluit tot wijziging van het Besluit BIBOB*, *Staatsblad* 2011, 418.

74 *Kamerstukken II* 2010-2011 32676, 3, p. 3.

75 Van Daele et al. 2010, p. 131.

76 Van Daele et al. 2010, p. 131.

77 See also: Van Daele et al. 2010, p. 131-132.

Paragraphs 2 and 3 of Article 3 BIBOB Act define the scope of what is to be considered a ‘serious danger’:<sup>78</sup>

- a. facts and circumstances leading to the reasonable suspicion that the applicant is connected to criminal offences. This suspicion can be based on police and judicial information;
- b. if the criterion described under a has been met, the administrative authority must assess the seriousness of those criminal offences;
- c. the nature of the connection; the connection to the criminal offence needs to be assessed, i.e. the connection needs to be interpreted in conjunction with sub d;
- d. the extent of the criminal profits gained or to be gained. Higher profits imply a greater level of risk.<sup>79</sup>

Paragraph 4 of Article 3 BIBOB Act determines the scope of ‘the nature of the connection’ to a criminal offence. To begin with, this refers to an offence the applicant has committed himself. It also encompasses offences under Article 51 of the Dutch Criminal Code committed by a legal entity at a time when the applicant was a manager or a board member or with which he had business relations. It further covers a situation in which someone else has committed a criminal offence but the applicant has a relationship with this person, for instance when this person has invested money in his business.<sup>80</sup> The new BIBOB Act has adjusted the concept of a ‘criminal offence’ under Article 3 BIBOB Act. Administrative offences for which a person or legal entity received an administrative fine (*bestuurlijke boete*)<sup>81</sup> are now included in screening, even if the business no longer exists.<sup>82</sup> Finally, paragraphs 5 and 6 state that when an administrative authority undertakes screening as explained above, the principle of proportionality needs to be respected. This means that revoking or refusing to grant a permit is only permitted if such actions are in proportion to the risk established under Article 3 paragraph 1 BIBOB Act.

#### 8.2.2.2 Screening of applicants for subsidies

The BIBOB provisions described above also apply to public subsidies. According to Article 6 paragraph 1, in conjunction with Article 3 BIBOB Act, an administrative authority can refuse to issue or can revoke a subsidy already issued to a person or legal entity if there is a serious danger of misuse. Article 4:21 paragraph 1 Awb defines a subsidy as:

<sup>78</sup> Van Daele et al. 2010, p. 131-132.

<sup>79</sup> Van Daele et al. 2010, p. 131-132; Struiksma & Kleene 2006.

<sup>80</sup> See also: Scholten 2013.

<sup>81</sup> *Kamerstukken II* 2010-2011 32676, 3, p. 21. A *bestuurlijke boete* is a punitive administrative sanction, as regulated under Title 5.4 of the Awb.

<sup>82</sup> De Moor-van Vught 2012, p. 65-76.

a claim to financial means, provided by an administrative authority for certain activities of the applicant, other than payment for goods or services.

For a subsidy to be subject to BIBOB screening, the option of BIBOB screening must be included in the conditions set for the subsidy.<sup>83</sup> The legislator, however, assumes that all public subsidies following from legislation or a governmental decree<sup>84</sup> should come under these conditions.<sup>85</sup> According to Article 6 paragraph 3 BIBOB Act, such a decision must comply with the law and must be proportional. A small subsidy amount, for example, would not justify the violation of the applicant's privacy that follows from the screening procedure. BIBOB screening can be applied to any subsidy because the content is too diverse to determine in advance which subsidy sectors should be included or exempted.<sup>86</sup>

### 8.2.2.3 Screening of tenderers under the BIBOB legislation

The BIBOB legislation also applies to public tenders at both the national and local levels.<sup>87</sup> After all, the reason behind the legislation is to prevent public bodies from unwillingly facilitating serious and organized criminal activities and thus to protect their integrity.<sup>88</sup> As we shall see, however, since the Public Procurement Act 2012 (*Aanbestedingswet 2012*) became effective on 1 April 2013, the BIBOB Act has played only a limited role in public tenders.<sup>89</sup>

Tender regulations are quite complex. First of all, EU legislation applies to tenders for works, deliveries and services above a certain threshold sum.<sup>90</sup> Second, national rules apply to public tenders and they may set conditions above and beyond the EU rules, for example for tenders that fall below the EU threshold sum. Finally, local authorities may also set specific rules regarding tenders.<sup>91</sup> The Public Procurement Act 2012 however sought to bring an end to the patchwork of rules by introducing a uniform screening instrument and by newly implementing the EU rules on exclusion grounds and legal protection.<sup>92</sup> In assessing tenders, we must distinguish between a qualitative assessment of the company or person applying under the tender procedure, the selection of providers, and the allocation criteria.<sup>93</sup> In the context of this report, the qualitative assessment is of primary importance. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004

83 Van Daele et al. 2010, p. 144.

84 In Dutch, a governmental decree is a '*Algemene maatregel van bestuur*' (AMvB).

85 Van Daele et al. 2010, p. 144.

86 Van Daele et al. 2010, p. 144.

87 Van Daele et al. 2010, p. 137ff.

88 *Kamerstukken* 1999-2000, 26883, nr. 3, p. 2; *Kamerstukken II* 2010-2011, nr. 3, p. 4.

89 *Kamerstukken I* 2012-2013, 32440, P.

90 Directive 2004/18/EC and Directive 2004/17/EC; De Moor-van Vught 2012 p. 65-76.

91 For an overview of the Dutch tender rules, see Pijnacker Hordijk, van der Bend & van Nouhuys 2005.

92 De Moor-van Vught 2012, p. 65-76.

93 Van Daele et al. 2010, p. 137ff.

on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts is relevant within the scope of the qualitative assessment, particularly Article 45, which lists both compulsory (paragraph 1) and facultative exclusion grounds (paragraph 2).<sup>94</sup>

The compulsory grounds for exclusion include previous convictions for participation in a criminal organization, corruption, fraud and money laundering. The facultative exclusion grounds comprise bankruptcy or similar situations, offences concerning professional conduct, failure to fulfil obligations to pay social security and other taxes or the misrepresentation or failure to provide information as required under Section 2 of the Directive, according to Article 45 paragraph 2g. Whenever an authority seeks to tender and to assess whether an applicant should be excluded and for which period, it needs to take into account the proportionality principle and the principle of non-discrimination.<sup>95</sup> As a rule, all public authorities need to consider the compulsory and facultative exclusion grounds for each tender.<sup>96</sup>

As we mentioned, the Act envisaged the renewed implementation of the EU Procurement Directives<sup>97</sup> and the directives regarding legal protection.<sup>98</sup> Previous legislation<sup>99</sup> lapsed after the Public Procurement Act 2012 entered into force, bringing to an end the complex body of rules that existed before the uniform screening instrument envisaged in the Act.<sup>100</sup>

Two components are of importance when looking at the uniform screening instrument: the 'self-declaration' and the 'declaration of conduct in tenders'. The 'self-declaration' is a statement by the business that both the compulsory and facultative exclusion grounds do not apply.<sup>101</sup> The 'declaration of conduct in tenders', based on Article 2.89 of the Act, allows the authority who is granting the tender to demand evidence that there are no exclusion grounds.<sup>102</sup> Antecedents that will be taken into account according to the Public Procurement Act 2012 are irrevocable convictions for criminal offences summed up in Articles 2.86 and 2.87, which describe the compulsory and facultative exclusion grounds respectively.<sup>103</sup> Other convictions considered are those in the economic sphere, taxes, weapons and munitions, illicit drugs or crimes by which persons or goods were endangered.

94 Van Daele et al. 2010, p. 137-140.

95 Van Daele et al. 2010, p. 140. See also 't Hart 2006, p. 616ff.

96 Van Daele et al. 2010, p. 140. See also 't Hart 2006, p. 616ff.

97 Directive 2004/17/EC and Directive 2004/18/EC.

98 Directive 2007/66/EC, Directive 89/665/EC and Directive 92/13/EEC.

99 *Besluit aanbestedingsregels voor overheidsdrachten* (BAO) and *Besluit aanbestedingen speciale sectoren* (BASS).

100 De Moor-van Vught 2012, p. 65-76.

101 De Moor-van Vught 2012, p. 65-76.

102 De Moor-van Vught 2012, p. 65-76.

103 *Kamerstukken II* 2009-2010, 32440, nr. 3, p. 78-80.

Finally, relevant antecedents include convictions for breaching EU and/or national tender regulations.<sup>104</sup>

The Public Procurement Act 2012 has minimized the role of the BIBOB legislation with regard to tenders. Only when there are questions regarding the origins of finances, the BIBOB Act and Bureau BIBOB still have a role to play.<sup>105</sup>

#### **8.2.2.4 The screening procedure and information sources**

This section outlines the screening procedure under BIBOB legislation and the sources of information that may be used to decide whether to refuse or revoke a licence, a subsidy or a tender. Asking Bureau BIBOB for advice is the final step in the procedure. First, the competent administrative authority itself must gather information, for example to assess whether the application is in compliance with the laws on which the licence, subsidy or tender was based (such as the Alcohol Licensing and Catering Act 2013).<sup>106</sup> Below, we first focus on the procedure with regard to licences and subsidies and then proceed with the procedure for tenders.

#### **The procedure for permits and subsidies<sup>107</sup>**

To begin with, administrative authorities will ask the applicant to provide relevant information.<sup>108</sup> For example, if he wants to buy a pub and acquire a licence based on the Alcohol Licensing and Catering Act, the authorities will ask him to provide information on his qualifications and experience in the sector, as well as an extract from the Chamber of Commerce register showing his business is listed and information on his income and financial backers. Who is lending him the money, for example? If he is paying for the pub from his own pocket, where and how did he acquire the necessary capital?

In addition, the administrative authorities may search for further information. They can access open sources, such as data registered with the Chamber of Commerce or the Land Registry, and information publicly available in newspapers and on the internet. Furthermore, the authorities may use semi-open sources, such as personal particulars from the Municipal Personal Records database (GBA).<sup>109</sup> Finally, the administrative authorities may ask for information from closed sources, such as police and judicial information.<sup>110</sup> This type of information gathering is seen as a 'minor test' in which the administrative authority does its own 'homework'. The information gathered from closed sources, for example, is limited to the applicant's criminal record and HKS information, comparable

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104 *Kamerstukken II* 2009-2010, 32440, nr. 3, p. 78-80.

105 De Moor-van Vught 2012, p. 65-76.

106 Joosten, Rovers & Urff 2008, p. 51ff.

107 In this section, the term 'permit' should also be understood to mean 'subsidy' unless indicated otherwise.

108 Klap & De Moor-van Vught 2009, p. 34-35; Joosten, Rovers & Urff 2008, p. 69ff.

109 *Gemeentelijke Basis Administratie* (GBA).

110 Joosten, Rovers & Urff 2008, p. 72-78; Van Daele et al. 2010, p. 132.



to the screening applied in relation to a VOG. In practice, administrative authorities often find it easier to request the applicant to hand in a VOG instead.<sup>111</sup> If the applicant is unable to present a VOG, this may be sufficient reason to refuse him a licence. Another important aspect of the BIBOB legislation laid down in Article 26 BIBOB Act is that a public prosecutor may ‘tip’ the administrative authority that seeking advice from Bureau BIBOB would be appropriate.<sup>112</sup> Of course, such a tip implies that the public prosecutor holds information on the applicant that is relevant to the licensing procedure, such as information that the applicant has committed criminal offences, or that there is a serious risk of the applicant committing criminal offences.<sup>113</sup> The tip itself does not need to be motivated; Bureau BIBOB and not the prosecutor will assess the applicant’s position.<sup>114</sup>

The ‘homework’ by the administrative authority can generate two results. First, the outcome may be that there is no evidence of a ‘serious danger’ that the licence or subsidy is being or will be misused for criminal activities. In that case, the applicant will be granted the licence or subsidy or an existing licence or subsidy will not be revoked.

Second, the ‘homework’ may cause the authorities to suspect a serious danger. In that case, the authorities may invite the applicant to a meeting in which he can dispute the suspicions. If he is able to do this successfully, the municipal authorities may decide to grant the licence or subsidy or to not revoke it. If the suspicions about the applicant or permit holder remain, the administrative authority can respond in three ways:

1. It can revoke or refuse the permit, based on the applicable law mentioned in Article 1 BIBOB Act.
2. It can refuse or revoke the permit based on Article 3 BIBOB Act, i.e. the serious danger criterion.
3. It can ask for in-depth (intensive) screening of the applicant by Bureau BIBOB.

This intensive screening focuses on a person’s (prior) involvement in criminal activities and on detailed information regarding his company structure, financing, his personal situation, general indicators and policy indicators.<sup>115</sup> This second screening differs from the first in that not only the applicant but also his business relations, for example his financial backers, are screened.

Bureau BIBOB’s advice centres on five topics: opacity with regard to the company’s structure, its financing, the circumstances surrounding the permit applicant, the background of the company’s financial backer and the owner of the premises in which the company

111 De Voogd, Doornbos & Huntjens 2007, p. 95; De Moor-van Vught 2012, p. 65-76.

112 Van Daele et al. 2010, p. 134; Joosten, Rovers & Urff 2008, p. 173.

113 NJB 2007, 1673 ‘Tipfunctie OM bij Wet BIBOB moet actiever’.

114 *Kamerstukken II* 1999/2000, 26 883, nr. 3, p. 3 6 en 73-74, en *Vzr. Rb. Roermond*, 16 January 2009, LJN BH0169.

115 Joosten, Rovers & Urff 2008, p. 405-407.

is situated, and other circumstances which suggest that Article 3 BIBOB Act may apply, such as a possible involvement in criminal activities. Bureau BIBOB may use a wide range of information sources to screen applicants for licences and subsidies. These include public sources, personal particulars gathered under Article 8 (opening words and sub e) of the Personal Data Protection Act (*Wet bescherming persoonsgegevens*, Wbp) and semi-closed sources provided to Bureau BIBOB under Articles 13 and 27 BIBOB Act.<sup>116</sup> Article 27 allows for exchanges of information with the Dutch Tax and Customs Administration, more specifically its department of investigation FIOD-ECD, the Dutch Immigration and Naturalization Service and the Unusual Transactions Reporting Centre. It also allows the Bureau BIBOB to request information from police sources, for example information gathered in criminal investigations. It is not necessary for the applicant to have been a suspect himself. He may for instance appear in the file because he regularly calls one or more suspects whose telephones are wiretapped. In a BIBOB procedure, this would indicate that he maintains personal or business relations with known criminals who might present a risk. In specific cases, even information provided by criminal informers may be admissible in a BIBOB procedure.

There are, however, two potential problems. To begin with, Bureau BIBOB cannot interview the applicant or actively gather new information, and it must therefore rely solely on information already available.<sup>117</sup> Second, the Bureau itself cannot search closed sources. Instead it can only ask, for instance the police, to provide all available information on the applicant and other subjects of relevance. It cannot check whether the information provided is indeed complete. Of course, lawyers working on behalf of the applicant will often try to prove that the advice was based on incomplete information and therefore biased.

The advice is formulated in such a way that the administrative authority can independently decide to grant, refuse or revoke the permit. The advice can have three possible outcomes, namely that there is no risk of the permit being used for criminal purposes, that there is a lesser risk,<sup>118</sup> and that there is a serious risk that this will be the case.<sup>119</sup> The Bureau only offers advice; it is the administrative authority that decides whether to grant, refuse or revoke the permit. Thus, legal protection for the applicant is ensured.<sup>120</sup> If the administrative authority decides to deviate from a 'serious danger' advice issued by Bureau BIBOB, it needs to explain its reasons under the provisions of Article 3:50 Awb. Based on the in-depth analysis, the administrative authority can then take one of three different decisions:

<sup>116</sup> *Kamerstukken II* 26883, nr. 3, p. 7; Van Daele et al. 2010, p. 134; Joosten, Rovers & Urff 2008, p. 179.

<sup>117</sup> Klap & De Moor-van Vught 2009, p. 34-35.

<sup>118</sup> In which case extra provisions may be added to the permit under Article 3 paragraph 7 BIBOB Act before granting it.

<sup>119</sup> Van Daele et al. 2010, p. 135; Joosten, Rovers & Urff 2008, p. 188.

<sup>120</sup> Van Daele et al. 2010, p. 135.

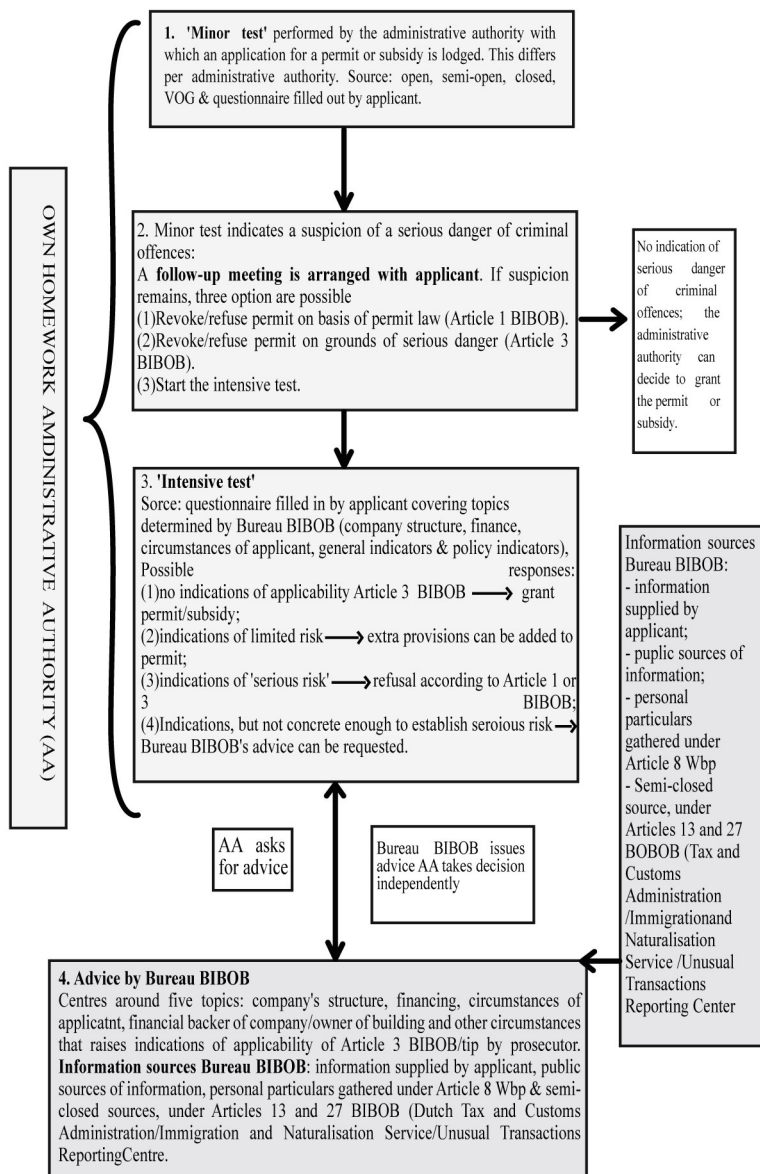
1. There is no indication that Article 3 BIBOB Act applies; the licence or subsidy can be granted;
2. There are indications of a limited risk; extra conditions can be added to the permit or its period of validity can be curtailed, for example;
3. A 'serious danger' is indicated; the administrative authority can refuse to issue the permit under applicable law as mentioned in Article 1 BIBOB Act or under Article 3 BIBOB Act.<sup>121</sup>

Figure 8.1 provides a summary of the procedure and information that can be accessed by the authorities.

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<sup>121</sup> Joosten, Rovers & Urff 2008, p. 171.

**Figure 8.1 Information access under the BIBOB Act for permits and subsidies**



### The procedure for tenders

With regard to tenders, specific procedures apply. On 1 April 2013 the Public Procurement Act 2012 entered into force. This legislation contains a uniform screening instrument applicable to public tenders and their applicants.<sup>122</sup> The screening procedure for tenders comprises two parts: (1) the personal declaration and (2) the statement regarding good conduct. The tenderer provides a personal declaration regarding the compulsory and facultative exclusion grounds, in accordance with the EU Procurement Directives.<sup>123</sup> The statement of good conduct, in the form of a Certificate of Conduct for Tenders (*gedragsverklaring aanbesteden*, GVA),<sup>124</sup> requires the applicant to prove what he has stated in the personal declaration,<sup>125</sup> namely that the exclusion grounds do not exist.<sup>126</sup> In the Netherlands, the Ministry of Security and Justice issues the statement of conduct.<sup>127</sup> Now that the Public Procurement Act 2012 has entered into force, other screening instruments are no longer allowed.<sup>128</sup> This ensures a uniform screening procedure for all public tenders.

However, when there is still doubt about the *bona fide* status of an applicant after he has provided the personal declaration and the statement of conduct, it remains possible to ask for advice under the BIBOB legislation.<sup>129</sup> It is expected that from now on, the BIBOB legislation will see limited use in the case of tenders.<sup>130</sup> Furthermore, since the introduction of the Public Procurement Act 2012, an administrative authority can only ask Bureau BIBOB for advice when the tender falls within the BIBOB sectors summed up under Article 5 paragraph 3 sub a.<sup>131</sup> Advice can also be requested when a contract is annulled, or – under certain conditions – when a subcontractor is hired.<sup>132</sup> Information regarding sources of financing and special financial transactions as well as information based on closed sources, such as criminal intelligence, can only be consulted when asking advice of Bureau BIBOB.<sup>133</sup>

#### 8.2.2.5 Legal protection when permits, subsidies and tenders are refused or revoked

The following section describes the procedures incorporated into the BIBOB legislation to protect the legal interests of a person or legal entity that is refused a permit, subsidy or tender, or that has a permit, subsidy or tender revoked. Below, we distinguish between

122 *Kamerstukken I* 2012-2013, 32440, nr. P.

123 De Moor-van Vught 2012, p. 65-76.

124 *Kamerstukken II* 2009-2010 32440, nr. 3, p. 29; De Moor-van Vught 2012, p. 65-76.

125 De Moor-van Vught 2012, p. 65-76; *Kamerstukken II* 2009-2010 32440, nr. 3, p. 19.

126 *Kamerstukken 2009-2010*, 32440, nr. 3, p. 19 en 29.

127 *Kamerstukken 2009-2010*, 32440, nr. 3, p. 19 en 29; De Moor-van Vught 2012, p. 65-76.

128 *Kamerstukken 2009-2010*, 32440, nr. 3, p. 19 en 29; De Moor-van Vught 2012, p. 65-76.

129 De Moor-van Vught 2012, p. 65-76.

130 De Moor-van Vught 2012, p. 65-76.

131 Van Daele et al. 2010, p. 142.

132 Van Daele et al. 2010, p. 142.

133 Van Daele et al. 2010, p. 142.

legal protection related to the refusal or revocation of permits and subsidies on the one hand, and tenders on the other.

### **Legal protection of applicants for permits and subsidies**

To begin with, Article 33 BIBOB Act offers the applicant to put forward his views on the matter when the administrative authority makes its intentions clear, prior to the actual decision.<sup>134</sup> Next, after the authorities take a decision, the parties concerned may revert to the legal protection procedure of the Awb, as described above.

Originally, the parties concerned and their lawyers were only notified of the intention and the decision taken by the competent authorities in writing. This summarized the findings of Bureau BIBOB, which carried out the actual screening. The defence was only allowed to read the underlying report by the Bureau and make notes, but was not allowed a copy. This procedure gave rise to all sorts of protests, for example that there was insufficient time to study the BIBOB advice and criticism as to whether the Bureau had presented a balanced account and had used information from all possible sources, including material favourable to the applicant's case.<sup>135</sup> To tackle these critiques, the procedure was changed in the new BIBOB Act. Now the applicant receives a copy of the BIBOB advice on request.<sup>136</sup>

Another important legal question is whether a negative decision concerning a permit, subsidy or tender is a 'criminal charge' according to Article 6 ECHR. If it is, all the safeguards of Article 6 ECHR would come into effect, such as the presumption of innocence, the *nemo tenetur* principle and the *nulla poena* principle. According to the ABRvS, a decision under BIBOB legislation to refuse or revoke a permit is not a 'criminal charge', because the intention of the decision is not to determine guilt of a criminal offence. Instead, Article 3 BIBOB Act aims to prevent public bodies from unwillingly facilitating criminal activities. Refusal or revocation of a permit is therefore not a retributive action and not a 'criminal charge'.<sup>137</sup>

The ECtHR followed the above view in *Bingöl v. The Netherlands*.<sup>138</sup> The applicant argued that the Dutch government, by applying the BIBOB Act, assumed he had committed offences for which he had not been convicted on the one hand, as well as illegal activities he might commit in the future on the other. According to the applicant, the above constituted a criminal charge and he concluded that the Dutch authorities had violated the safeguards of Article 6 paragraph 2. The ECtHR considered as follows:

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134 Van Daele et al. 2010, p. 135ff (permits) and p. 145 (subsidies).

135 *Kamerstukken II* 2010-2011, 32 676, nr. 3, p. 14; *Staatsblad* 28 March 2013, nr. 125.

136 *Kamerstukken II* 2010-2011, 32 676, nr. 3, p. 14; *Staatsblad* 28 March 2013, nr. 125.

137 ABRvS 16 July 2008, LJN: BD7378; ABRvS 8 July 2009, *Jurisprudentie Bestuursrecht* 2009, 183; De Moor-van Vught 2012, p. 65-76.

138 *Bingöl v. The Netherlands*, 20 March 2012, no. 18450/07.

34. The Court notes that unlike in a number of other cases concerning Article 6 § 2 brought against the same respondent Party, the applicant in the present case does not complain of the wording of a judicial or other decision reflecting a finding of guilt on his part after a prosecution that did not result in a conviction. [...] Rather, the applicant complains that the refusal of the operating license in and of itself violates Article 6 § 2 in that it takes his criminal antecedents into account. 35. The Court and Commission have taken the view that, for purposes of conviction and sentencing Article 6 does not prevent domestic courts from having regard to an existing criminal record. [...] It cannot see any reason of principle why Article 6 § 2 should prevent competent authority from doing so in considering whether a person meets standard of probity required for a particular purpose.

The Court goes on in paragraph 36 to cite *McParland v. the United Kingdom*<sup>139</sup> and reiterates:

The Court observed that the impugned proceedings had taken the form of a licensing procedure. At no stage had they involved the determination of a criminal charge within the meaning of Article 6 § 1 of the Convention. This conclusion was not affected by the fact that the applicant's request for license there in issue had foundered on the basis of his previous criminal convictions. 37. In the present case also, the applicant was refused an operating license on the ground that, in view of his criminal antecedents, he was deemed unfit to carry on his intended business. Identical reasons therefore apply.

Here, the ECtHR followed the line of reasoning of the ABRvS, considered Bingöl's application inadmissible, and therefore rejected it. However, it can be argued that if the applicant had complained that the refusal or revocation of the licence punished him for (future) crimes, the ECtHR should at least have declared him admissible. In addition, possible complaints could also have been directed at a violation of the *ne bis in idem* principle. After all, the administrative authorities use previous criminal convictions to refuse or revoke a permit, which could be argued is a second determination of guilt for the same crime.<sup>140</sup>

<sup>139</sup> *McParland v. the United Kingdom*, 30 November 1999, no. 47898/99.

<sup>140</sup> For a critical view of the Dutch 'administrative approach' and the BIBOB Act as well as the *Wet controle rechtspersonen* in relation to 'criminal charge', see Klap & De Moor-van Vught 2009 and De Moor-van Vught 201, De Moor-van Vught 2012.

### Legal protection of applicants for tenders

Since the exclusion of an applicant to a tender is a civil – and not a governmental – decision by an administrative authority, complaints against such decisions can in principle be submitted to a Dutch civil court.<sup>141</sup> Summary proceedings are also a possibility.<sup>142</sup> However, when the tender involves a public legal act by the administrative authority, the administrative court is competent.<sup>143</sup> Article 3 paragraph 3 in conjunction with paragraph 1 BIBOB Act ensures that the relevant party is allowed to submit its views if an administrative authority takes a decision (under Article 5 paragraph 3 sub c) on the allocation of a public tender or the annulment of a contract for a public tender.<sup>144</sup> Once that party has expressed its views and the administrative authority upholds its decision, the parties concerned may file an objection with that administrative authority under the legal protection procedure of the Awb.<sup>145</sup> If the administrative authority upholds its decision after reviewing the objection, the parties can appeal to the administrative court and the ABRvS.<sup>146</sup>

The aforementioned Public Procurement Act 2012 also introduces the amended Implementation of Judicial Protection Public Procurement Directives Act (*Wet implementatie rechtsbeschermingsrichtlijnen aanbesteden*, Wira), which is incorporated into Articles 2.126 through 2.130.<sup>147</sup> The Wira governs legal protection with regard to tenders, but only those requiring an announcement in the Official Journal of the European Union under the BAO and Bass decrees, which implement the EU Procurement Directives for public tenders in traditional and ‘special’ sectors.<sup>148</sup>

#### 8.2.3 *Wet controle op rechtspersonen (Wcp)*

The Legal Entities (Supervision) Act (*Wet controle op rechtspersonen*, Wcp) entered into force on 1 July 2011.<sup>149</sup> The purpose of the Wcp is to supervise legal entities throughout their lifespan in order to prevent and combat their misuse and to simplify the criminal investigation of actual or intended offences committed through their misuse.<sup>150</sup> The legis-

141 Van Daele et al. 2010, p. 142; *Kamerstukken II* 1999-2000, 26 883, nr. 3, p. 7.

142 Van Daele et al. 2010, p. 143.

143 Van Daele et al. 2010, p. 142.

144 Van Daele et al. 2010, p. 142.

145 Van Daele et al. 2010, p. 142.

146 Van Daele et al. 2010, p. 143.

147 *Staatsblad* 2012, 682; *Kamerstukken II* 2009-2010, 32440, nr. 3, p. 49. The Wira will be retracted as a separate act and wholly integrated into the 2012 Public Procurement Act.

148 Van der Velden & Radder 2013, p. 46.

149 *Staatsblad* 2011, 194, amending the *Wet documentatie vennootschappen*.

150 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 2.



lation particularly targets financial and economic crime.<sup>151</sup> Screening takes place whenever a change occurs in a legal entity, such as a takeover or a change in board.<sup>152</sup>

Implementation of the Wcp brought about several changes. Earlier on, only private limited (BV) and public limited (NV) companies came under supervision.<sup>153</sup> Now, this also applies to foundations, associations, cooperatives and foreign companies.<sup>154</sup> Moreover, screening not only involves the persons directly associated with the legal entity, but also their spouses, parents, grandparents and children.<sup>155</sup> Family members are only screened when this is deemed necessary to analyse the management network of the legal entity.<sup>156</sup> Finally, companies used to be screened only when they were founded and when their articles of association were amended.<sup>157</sup> Under the Wcp, screening takes place whenever changes occur in key data regarding the entity.<sup>158</sup>

### Procedure and access to information

The screening of legal entities consists of four steps:

Dienst Justis automatically commences screening when there are changes in key information concerning the legal entity.<sup>159</sup> These include both public and closed databases, such as the municipal personal records database (GBA), the Commercial Register, the Land Registry Database, the registry of the Employee Insurance Agency (UWV), the Central Insolvency Register, and the Criminal Records System. Dienst Justis gathers information on, for instance, the founding of the legal entity, its board members and stockholders, any move to other premises by the legal entity etc., as well as criminal and financial antecedents of the legal entities and persons involved.<sup>160</sup>

Dienst Justis performs a risk analysis at the request of an enforcement authority.<sup>161</sup> Based on this risk analysis, the Tax and Customs Administration and the Land Registry Office also provide information.<sup>162</sup> The National Police can check the available data against ongoing criminal investigations in the police registry.<sup>163</sup> If the information gathered leads to the conclusion that an increased risk is present, a risk report is sent to several enforcement

151 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 1-2 & 17; Hartmann & van der Wulp 2011, p. 288ff.

152 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 2.

153 De Moor-van Vught 2012, p. 65-76.

154 De Moor-van Vught 2012, p. 65-76; *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 3-4; Hartmann & van der Wulp 2011, p. 288ff.

155 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 13. Their involvement is mentioned as increasing the risk of circumvention.

156 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 14.

157 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 1-2.

158 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 4.

159 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 4.

160 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 4.

161 Hartmann & van der Wulp 2011, p. 290.

162 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 5.

163 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 5.

authorities, i.e. the public prosecution service, the Tax and Customs Administration, the Dutch Central Bank (DNB), the Netherlands Authority for the Financial Markets (AFM), the police, and special investigation services such as the FIOD-ECD.<sup>164</sup> The risk report can lead to two types of interventions by the enforcement authorities referred to in Section 8.3, i.e.:

- a criminal investigation when there is concrete information on a criminal offence;<sup>165</sup>
- a preventive intervention, which must be undertaken within two years of the risk report date, such as the start of a BIBOB investigation or refusal to grant a tender.<sup>166</sup> Please note that Chapter 5 of the Awb is not applicable to activities deployed by Dienst Justis, as will be discussed below.<sup>167</sup>

The interventions remain the responsibility of the enforcement authorities that receive the risk reports.<sup>168</sup> Other authorities that need the information to execute their public tasks, such as the Financial Intelligence Unit Netherlands (FIU-NL), are allowed to request information from Dienst Justis.<sup>169</sup>

### Legal protection

In the explanatory memorandum for the Wcp, specific attention was given to the – at that time new – instrument of the risk report and its relationship to Article 8 ECHR, Article 10 paragraph 1 of the Dutch Constitution, and the Personal Data Protection Act (*Wet bescherming persoonsgegevens*, Wbp).<sup>170</sup> Concrete measures are: (1) persons, and their family members,<sup>171</sup> who are involved in a legal entity will be informed about the screening when the legal entity is registered with the Dutch Chamber of Commerce;<sup>172</sup> (2) existing legal entities to which the Wcp applies will be informed via other means, such as a public information campaign;<sup>173</sup> (3) the risk report will be removed from the databases of the enforcement authorities if the report has not been used for a period of two years;<sup>174</sup> (4) according to Articles 35 and 3 of the Wbp, any parties involved can request access to the data stored by Dienst Justis and ask for it to be corrected.<sup>175</sup> When an authority takes a

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164 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 5; <http://www.justis.nl/>.

165 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 7.

166 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 7; De Moor-van Vught 2012, p. 65-76.

167 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 17; Hartmann & van der Wulp 2011, p. 289.

168 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 7.

169 De Moor-van Vught 2012, p. 65-76. Hartmann & van der Wulp 2011, p. 290.

170 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 9-14.

171 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 14.

172 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 12.

173 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 12.

174 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 13.

175 *Kamerstukken II* 2008-2009, 31948, nr. 3, p. 13.

decision based on the information received from Dienst Justis under the Wcp, the applicable laws are those regarding the specific enforcement regime on which the decision was based.

### 8.3 INSTRUMENTS DIRECTED AT PREVENTING THE DISTURBANCE OF PUBLIC ORDER

In this section, we will discuss the administrative instruments directed at preventing the disturbance of public order and their relevance for curbing serious and organized criminal activities. First, Section 8.3.1 describes the possibilities for monitoring and sanctioning under the Awb. Next, Section 8.3.2 discusses the opportunities to refuse and revoke licences under the regime of local spatial plans. Section 8.3.3 describes local regulations issued under the municipal by-law (*Algemeen Plaatselijke Verordeningen*, APV). Section 8.3.4 concludes this section by examining the powers of administrative authorities to close and expropriate premises.

#### 8.3.1 *Instruments included in the Awb*

As mentioned above, the Awb is the overarching instrument for administrative procedural law, and regulates the decision making process, the formalities regarding decisions and legal protection in relation to these decisions. The Awb offers administrative authorities several enforcement tools. Naturally, these instruments are not solely relevant in the context of an administrative approach to serious and organized crime, but for ensuring compliance with administrative laws in general.

This section briefly discusses the supervising and sanctioning instruments of the Awb. This will also help clarify the instruments discussed in subsequent sections, which rely to some extent on the Awb instruments. For municipalities, the competent authority is the Mayor and Municipal Executives (*College van Burgemeester en Wethouders*), based on Article 125 of the Municipalities Act (*Gemeentewet*). For provinces, it is the Provincial Executive (*Gedeputeerde Staten*), based on Article 122 of the Provinces Act (*Provinciewet*). For the District Water Boards (*Waterschappen*),<sup>176</sup> it is the chairperson (*Dijkgraaf*), based on Article 61 of the Water Board Act (*Waterschapswet*).

#### **Supervising instruments under the Awb**

The Awb comprises a number of inspection tools, which are listed in Chapter 5 Awb. These include:

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<sup>176</sup> Administrative units in the Netherlands that are empowered to manage Dutch water supplies.

- entering premises, with the exception of private homes, without permission (Article 5:15 Awb);
- requesting information (Article 5:16 Awb);
- requesting identification documents from persons (Article 5:16a Awb);
- requesting data and documents concerning businesses (Article 5:17 Awb);
- investigation of objects, such as measurement, sampling and opening of packages (Article 5:18 Awb);
- stopping and investigating means of transport and their cargo as well as requesting relevant documents as prescribed by law from the driver and/or shipmaster (Article 5:19 Awb)

Article 5:20 Awb obliges persons to cooperate with the execution of the aforementioned competences.

### Sanctioning instruments under the Awb

The administrative authorities can impose sanctions when a natural person or legal entity<sup>177</sup> does not comply with the local regulations set by the competent administrative authority within their jurisdiction or with legislation for which the municipality (or province) is administratively responsible. According to Article 5:1 paragraph 1 of the Awb, an administrative offence is 'conduct in breach of regulation determined by or through legislation.' Conduct constituting an administrative offence is usually a criminal offence as well.<sup>178</sup> This implies that in those cases, the public prosecution service may start a parallel criminal investigation. Generally, however, offences will first be dealt with administratively and if that does not result in compliance, the authorities will start criminal proceedings.

The Awb includes three types of administrative sanctions: orders for administrative coercion (*last onder bestuursdwang*); orders for administrative penalties ((*preventieve*) *last onder dwangsom*) and administrative fines (*bestuurlijke boete*).

The order for administrative coercion is imposed on a non-compliant actor to force him to (wholly or partially) repair a breach of an administrative regulation to the original factual situation.<sup>179</sup> The order for administrative coercion is addressed to the person or legal entity in breach. It states which actions must be taken and sets a deadline.<sup>180</sup> The order can be executed either by the person who has breached the administrative regulation or, if he fails to do so in good time, by the administrative authority itself. In that case, the costs of the repair are borne by the non-compliant actor.<sup>181</sup> For example, if someone built

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<sup>177</sup> Article 5:1 paragraph 3 Awb.

<sup>178</sup> Van Daele et al. 2010, p. 104.

<sup>179</sup> Article 5:21 Awb.

<sup>180</sup> Article 5:24.

<sup>181</sup> Article 5:25 Awb.

an extension to his house without a permit, the municipality may require it to be torn down to restore the original situation.<sup>182</sup> The administrative authorities cannot impose an order for administrative coercion in cases requiring immediate enforcement, for example because the situation is dangerous.<sup>183</sup>

The second instrument, the order for administrative penalties, is comparable to the order for administrative coercion. The main difference is that the non-compliant actor is also required to pay a fine if he fails to restore the illegal situation or exceeds the time limit set.<sup>184</sup> Administrative authorities that are competent to apply an order for administrative coercion are also competent to apply an order for administrative penalties. However, they may not impose both simultaneously.<sup>185</sup> The administrative authorities can also impose an order for administrative penalties preventively,<sup>186</sup> for example for a notorious offender who repeatedly commits the same violations.<sup>187</sup>

Finally, administrative fines are an important instrument. The aim of the fine is not restoration, but is solely an obligation on the offender to pay.<sup>188</sup> Article 5:44 Awb prevents concurrence of an administrative procedure for an administrative fine and a criminal procedure for the same offence. Consequently, there has been some discussion in the Netherlands as to whether such a sanction falls within the scope of ‘criminal charge’ as meant under Article 6 ECHR.

Apart from these sanctioning instruments, the administrative authorities may of course also revoke decisions and licences whenever the person or legal entity fails to comply with the relevant conditions. This decision follows from Article 1:3 of the Awb and from specific laws applying to the activity. For example, the competent authorities may shut down part or all of a company for a certain period if it violates its environmental permit and causes pollution. Thus, further damage to the environment is prevented and the company will be obliged to take measures to prevent reoccurrence. In addition, the administrative authorities may also require the legal entity to clean up the pollution it caused, and if this is impossible, for example in the case of air pollution, they may impose an administrative fine. If the offence is repeated, the authorities may decide to revoke the environmental permit.

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182 Van Daele et al. 2010, p. 105.

183 Van Daele et al. 2010, p. 109. For instance, an *order for administrative coercion* can be imposed when a café where illicit drugs are being used and traded causes a nuisance. It cannot be imposed if a demonstration takes place without a permit and needs to be broken up.

184 Article 5:31d Awb.

185 Article 5:32 Awb.

186 Article 5:32a Awb.

187 <http://www.hetccv.nl/instrumenten/bestuurlijke-aanpak/menu-bestuurlijk-instrumentarium/menu1/menu2.html>.

188 Article 5:40 Awb.

### **Legal protection**

Article 8:1 of the Awb offers persons and legal entities subject to an order for administrative coercion or an administrative penalty the opportunity to object. The objection must be in writing and must state reasons. It is sent to the administrative authority that took the primary decision (the municipality, the province or the water board), which will then review its decision. If the competent authority dismisses the objection, the applicant can appeal to the court of first instance and if this appeal is also dismissed, to the Administrative Law Division of the Council of State (ABRvS).

In a case of an administrative fine, the situation is different. There is greater legal protection for the offender. The following rights of the offender substantiate this higher protection. First, the offender has the right to inspect the documents (Article 5:49 paragraph 1); second, he has the right to obtain documents in a – for him – understandable language (Article 5:49 paragraph 2), in accordance with Article 6 paragraph 3 ECHR. He also has the right to call witnesses (Article 7:8 paragraph 1 in conjunction with Article 7:22 paragraph 1 and Article 8:60 paragraph 4 Awb) and has the right of legal counsel for the ongoing procedure (Articles 2:1 and 8:24 Awb). Moreover, the interested party can lodge an objection and appeal against the administrative fine in the same way as for the orders. However, in appeal against the fine, the interested party is not obliged to make a statement concerning the offence in accordance with Article 8:28a Awb, referring to the safeguard of the ‘criminal charge’ as defined under Article 6 paragraph 2 ECHR. That obligation does exist for other administrative appeals under Articles 8:27 and 8:28 Awb.

To ensure further safeguards, the Awb offers two procedures for the administrative fine: a ‘light’ and a ‘heavy’ procedure. The light procedure applies when the fine is 340 euros or lower and the heavy procedure when it exceeds this threshold, unless exceptions included in other – more specific – legislation apply. There are three differences between the light and heavy procedures. In the heavy procedure, the authority is obliged to draft an official report (Article 5:53 paragraph 2 Awb), there must be a hearing (Article 5:53 paragraph 3 Awb), and the official who detects the offence punishable by an administrative fine cannot be the same official who inflicts the fine. Under the light procedure, these obligations do not apply.

With regard to the revocation of positive decisions, for instance when a permit has already been given and the administrative authority decides to revoke that permit based on a violation of the terms of that permit, Article 1:3 in conjunction with 6:1 and 6:2 Awb offer the opportunity to object to the revocation. The normal objection procedure, as explained in Section 8.2 of this report, applies in such cases.

8.3.2 *Refusing and revoking permits under the local spatial plan regime*

While conducting a supervising action in the context of the Emergo project in Amsterdam, the administrative authorities discovered an illegal hotel in the city's Red Light District. Since this contravened the local spatial plan – the premises could only be used as a private home and not for business purposes – the municipal authorities forced the owners of the premises to restore it to its original and legal purpose.<sup>189</sup> This required radical renovation work (the premises had been divided into different rooms that had been rented out separately), which ensured that it could no longer be used as a hotel.

Spatial plans as defined by Dutch administrative law are regulations governing a specific part of a municipality or province. Spatial plans are regulated by the Environmental Licensing (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht*, Wabo) and to a lesser extent by the Spatial Planning Act (*Wet Ruimtelijke ordening*, Wro). According to Article 3.1 paragraph 1 Wro, at the local level spatial plans incorporate rules on how to utilize the land – and the real estate on that land – within the municipality's geographical area. The local authorities may draw up specific spatial plans for different parts of the municipality.<sup>190</sup> A spatial plan is valid for a period of ten years.<sup>191</sup> As the example above shows, spatial plans give administrative authorities an important tool for regulating activities, including those associated with crime. Below, we briefly discuss the main instruments available in the Netherlands. The reader be aware that this is a very complex area of administrative law and that this report will only discuss the basics.

### **The integrated physical environment permit**

The integrated physical environment permit or *omgevingsvergunning* was introduced in 2010 with the enactment of the Wabo. It combines over 25 existing permits and exemptions for activities such as building and demolition, and it also applies to environmental protection.<sup>192</sup> The Wabo offers a unified and univocal administrative enforcement regime for the integrated physical environment permit.<sup>193</sup> The enforcement regime also extends to affiliated areas of legislation.<sup>194</sup>

189 Projectgroep Emergo 2011, p. 168 and 218-219.

190 Article 3.1. Wro.

191 Projectgroep Emergo 2011, p. 168 and 218-219.

192 *Kamerstukken II* 2008-2009, 31953, nr. 3, p. 3. This permit was implemented to unify and shorten the many permit procedures, as well as to improve cooperation between and within tiers of government in the Netherlands and to improve the overall quality of execution.

193 *Kamerstukken II* 2008-2009, 31953, nr. 3, p. 13.

194 *Kamerstukken II* 2008-2009, 31953, nr. 3, p. 14.

### Refusing and revoking permits under the Wabo

First of all, the granting, refusing or revoking of an integrated physical environment permit is important in the context of this country report. Article 2.1 Wabo lays down that an integrated physical environment permit is necessary for building, constructing, demolishing and utilizing buildings or land in concordance with a spatial plan or order. Performing one of the above activities without a permit constitutes a breach of the Wabo legislation.<sup>195</sup>

The Wabo offers different administrative competences to enforce the legislation.<sup>196</sup> Article 2.2 Wabo determines that when a municipal or provincial regulation states that a permit or exemption is required to perform the activities as described in sub a-k of Article 2.2, that regulation constitutes a prohibition on performing those activities without a permit or exemption. Article 2.3 Wabo prohibits any action that contravenes the conditions set in the integrated physical environment permit. The integrated physical environment permit covers an entire project and – if applicable – assesses the different aspects of that project in one go.<sup>197</sup> Article 2.3a Wabo states that it is prohibited to maintain any part of a building that has been built without such a permit.

Articles 2.10 to 2.20 clarify the grounds for refusing an integrated physical environment permit. These include, for instance, violation of the local spatial plan.<sup>198</sup> Article 2.20 creates a special ground for refusal. If an integrated physical environment permit is requested for a building project (Article 2.1, paragraph 1 sub a), the competent authority can request a screening of the application under BIBOB legislation. This article has been in force since 1 October 2010.<sup>199</sup> A competent authority can refuse or withdraw the integrated physical environment permit whenever the BIBOB screening detects a serious risk that the permit will be used to exploit profits derived from actual or future criminal offences. BIBOB screening includes criminal offences committed by cooperating partners (in legal entities).<sup>200</sup> According to paragraph 2 of Article 2.20 Wabo, the competent authority can also request a advice from Bureau BIBOB. There is thus a direct link to screening under the BIBOB Act and a permit-issuing instrument.

Paragraph 2.6ff<sup>201</sup> and Chapter 5 Wabo establish the guidelines for revoking an integrated physical environment permit. Chapter 5 Wabo concerns revocation as a sanction. It starts by identifying the laws to which the enforcement regime of the Wabo applies. The enforcement regime applies to the integrated physical environment permit as well as to

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195 *Kamerstukken II* 2008-2009, 31953, nr. 3.

196 A criminal law response is also possible under the Economic Offences Act (*Wet Economische delicten*, WED).

197 *Kamerstukken II* 2008-2009, 31953, nr. 3, p. 21.

198 Article 2.11 Wabo.

199 *Staatsblad* 2010, 231.

200 ABRvS 15 July 2009, nr. 200807654/1/H3.

201 It is possible to revoke part of a permit, according to Article 2.29. According to Article 2.30 to 2.32, a permit can be amended by several different competent authorities. Article 2.33 allows for the possibility of completely revoking a permit.



an extensive list of activities involving the protection of the environment and historical buildings and sites. A permit or exemption can only be revoked by the administrative authority that had the competence to grant the permit or exemption in the first place.<sup>202</sup>

This is not necessarily the competent authority of the enforcement regime under Chapter 5 of the Wabo.<sup>203</sup> Paragraph 3 of Article 5.19 dictates that an administrative authority cannot withdraw a permit and/or exemption unless and before it offers the person in breach the opportunity to comply, within a specific timeframe, with the general or specific terms of the permit or exemption, in accordance with paragraph 4.<sup>204</sup> In total, there are seven grounds for withdrawing a permit or exemption. Article 5.19 paragraph 1 offers four general grounds:

- i. the permit or exemption has been granted due to incorrect or incomplete information;
- ii. the permit or exemption holder is acting or has acted in breach of the permit or exemption;
- iii. current or past non-compliance with the requirements or limitations of the permit or exemption;
- iv. current or past non-compliance with the general rules that apply for the permit or exemption holder.

Paragraph 2 adds one particular ground to the aforementioned grounds:

- v. a permit concerning the management of hazardous substances can be withdrawn if the holder acts in breach of Article 10 of the Environmental Management Act (*Wet Milieubeheer*).

Finally, paragraph 4 formulates two grounds for withdrawing an integrated physical environment permit:

- vi. if a permit for activities as meant in Article 2.25 Wabo is granted to a specific person, and someone else executes those activities;
- vii. if a ground for refusal under the BIBOB Act is present, which means that there is a serious risk that the permit or exemption is being used (in part) to commit criminal offences or to exploit profits from criminal offences.<sup>205</sup> Article 2.20 of the Wabo is applicable as well.

202 *Kamerstukken II* 2006-2007, 30 844, nr. 3, p. 140-141 (in this document, the article is referred to as article 5.21).

203 *Kamerstukken II* 2006-2007, 30 844, nr. 3, p. 140-141.

204 This opportunity to comply with the permit and/or exemption is not a separate decision by the administrative authority and is therefore not open to objection or appeal. ABRvS 19 May 2004, JN 2004, 258.

205 *Kamerstukken II* 2006-2007, 30 844, nr. 3, p. 140-141.

### The consent and enforcement regime of the Wabo

The enforcement regime of the Wabo is both administrative and criminal: acting without or in violation of an integrated physical environment permit is a criminal offence under the Economic Offences Act (*Wet Economische Delicten*, WED).<sup>206</sup> The consent and enforcement regime of the Wabo fully applies to the Wro and thus to spatial planning.<sup>207</sup> This encompasses all of Article 2.1 paragraph 1, sub a to d Wabo, which includes building (sub a), construction activities (sub b), utilization in breach of the zoning plan (sub c) and demolition (sub d).<sup>208</sup>

According to Article 2.4 Wabo, the relevant authorities for the integrated physical environment permit are the Mayor and Municipal Executives.<sup>209</sup> Only when a project is of national or provincial interest does the Minister or the Provincial Executive qualify as the competent authority.<sup>210</sup> Article 5.10 and 5.11 Wabo regulate administrative enforcement. Under these provisions, public servants are designated as supervisors regarding compliance with the Wabo provisions and affiliated laws. In principle, the relevant Minister appoints the public servants. However, Article 5.10 paragraph 3 determines that most public servants will be appointed by local authorities, such as the municipalities. These public servants are basically competent only within the jurisdiction of the relevant municipality.<sup>211</sup>

The public servants appointed in this manner have the following competences. First, they can apply the competences regulated by the General Administrative Law Act (Awb) discussed above. In addition, public servants appointed under the Wabo and affiliated laws may, according to Article 5.13 Wabo, enter houses without the occupant's consent if one of the conditions listed in paragraph 1 sub a – e applies. These activities have in common that public servants must be able to enter houses without consent in order to properly execute their supervisory tasks. The procedural requirements for entering houses are regulated by the General Act on Entry into Dwellings (*Algemene wet op het binnentreden*, Awbi). The public servant needs written and signed authorization under Article 2 paragraph 3 of the Awbi. Furthermore, according to case law, they can only search by – literally – looking around the house that they have entered.<sup>212</sup> They may not open closets, search under floors, etc.<sup>213</sup> While in the house, they can make use of their other competences under the Awb, as explained in Section 8.3.1 of this country report.<sup>214</sup>

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206 *Kamerstukken II* 2006-2007, 30844, nr. 3, p. 51. The implications of the criminal response will not be discussed in this country report.

207 *Kamerstukken II* 2006-2007, 30844, nr. 3, p. 17.

208 *Kamerstukken II* 2006-2007, 30844, nr. 3, p. 17.

209 *Kamerstukken II* 2006-2007, 30844, nr. 3, p. 18.

210 *Kamerstukken II* 2006-2007, 30844, nr. 3, p. 18.

211 Public servants however can be appointed by more than one local authority.

212 E.g. Hoge Raad 21 October 2003, LJN: AH9998, r.o. 4.7.

213 Hoge Raad 21 October 2003, LJN: AH9998, r.o. 4.7.

214 Blomberg, *Tekst & Commentaar Wet algemene bepalingen omgevingsrecht*, commentaar bij artikel 5.13.

### Sanctions other than revoking permits under the Wabo

Title 5.3 of the Wabo lists the sanctions applying to violations of the conditions set in the integrated physical environment permit or affiliated legislation. The competent administrative authority may administer two types of sanctions, namely the order for administrative coercion and the order for administrative penalty as defined by the Awb. However, the Wabo has expanded the conditions related to these instruments as follows:

1. Everyone is obliged to cooperate with the public servants who are executing their supervisory tasks, according to Article 5:20 Awb, as described in paragraph 8.3.1. If someone is uncooperative, the administrative authority can apply administrative coercion or an administrative penalty under Article 5.14 Wabo. Before this competence was extended to the authorities, cooperation could only be enforced by criminal law.<sup>215</sup>
2. According to Article 5.15 Wabo, the Minister of Infrastructure and Environment has the authority to enforce an order for administrative coercion under the Wabo or affiliated laws if (a) he is responsible for administrative enforcement and (b) no other administrative authority is authorized. In most cases however the local authority will be competent.<sup>216</sup>
3. Article 5.17 broadens the use of the orders for administrative coercion and administrative penalty. Under the regime of Article 5.17, these measures can be employed to prevent a risk to public health and/or safety. Instead of employing administrative coercion or a penalty to end the situation breaching the Wabo or affiliated laws, the orders can be used to manage hazardous situations (temporarily).<sup>217</sup> The aim is to prevent the situation from leading to injury or damage. For instance, administrative authorities can put a fence around a hazardous building.<sup>218</sup>
4. Article 5.18 allows for the orders to be imposed not only on the person who is in breach of the administrative regulation, but also on his legal successor. This is called 'proprietary effect' (*zakelijke werking*). Whether someone is a legal successor is determined by the regime of Article 2.28 Wabo.<sup>219</sup> Proprietary effect is only possible when the decision taken by the administrative authority has been registered in public registers<sup>220</sup> and any legal successor can be assumed to have cognizance of it.<sup>221</sup> Competence is discre-

215 *Kamerstukken II* 1999-2000, 26929, nr. 3, p. 12. More specifically via Article 184 of the Dutch Criminal Code (intentionally obstructing an official order).

216 *Kamerstukken II* 2006-2007, 30844, nr. 3, p. 56; p. 138.

217 *Kamerstukken II* 2006-2007, 30 844, nr. 3, p. 139-140 (in this document, the article is referred to as Article 5.19).

218 *Kamerstukken II* 2006-2007, 30 844, nr. 3, p. 139-140.

219 *Kamerstukken II* 2006-2007, 30 844, nr. 3, p. 140 (in this document, the article is referred to as Article 5.20).

220 More specifically the *Gemeentelijke beperkingenregister* ex Article 7 paragraph 3 sub a *Wet kenbaarheid publiekrechtelijke beperkingen onroerende zaken*.

221 *Kamerstukken II* 2006-2007, 30 844, nr. 3, p. 140.

tionary.<sup>222</sup> Legal succession can take place through transfer of property,<sup>223</sup> but other possible options are transfer of rent or lease.<sup>224</sup> Proprietary effect can be useful in preventing illegal occupants of a building or to tackle cannabis cultivation.<sup>225</sup>

### Legal protection

Chapter 6 of the Wabo clarifies the legal protection with regard to government decisions. It mainly follows the regulations of the Awb, albeit with some exceptions. Title 8 Awb provides for two instances of appeal. First, the lower court decides in appeal. If the person who has lodged an appeal is dissatisfied with the ruling of the lower court, he can submit an appeal to the ABRvS. One exception is when an appeal is lodged against a decision concerning a spatial plan based on the Wro. In that case, it may be possible to lodge the appeal directly with the ABRvS. Articles 6.4 to 6.5a Wabo list other exceptions to the Awb.

#### 8.3.3 *Municipal by-law (APV)*

A well-known Dutch operator of several pubs and restaurants was suspected of bankruptcy fraud. The immediate cause was the closure of a restaurant (the Oysterbar) in Amsterdam due to bankruptcy. The owner, who also owns other restaurants and bars in Amsterdam and Groningen, was suspected of a construction whereby he took on leases from legal entities, paying the rent but not the taxes they were obliged to pay. The tax debts of the legal entities grew, they were declared bankrupt, and then a new legal entity would take over the business, often with the same persons, including the final owner, on the board. The City of Amsterdam decided to establish a team to investigate the circumstances of the closure of the Oysterbar as well as other associated pubs and restaurants. The team advised the municipality – amongst others<sup>226</sup> – to revoke the business permits because actions by the operational management disturbed public order and were in violation of the municipal by-law.<sup>227</sup> After all, the owner and operators were only able to profit from their construction (and to continue doing so) because the City of Amsterdam had issued permits and licences for their business and the sale of liquor.

222 As can be shown by the wording of the article, which says that the authority *may* impose such a sanction, not that it *must* impose.

223 *Kamerstukken II* 2006-2007, 30 844, nr. 3, p. 140.

224 Blomberg, *Tekst & Commentaar Wet algemene bepalingen omgevingsrecht*, commentaar bij 5.18.

225 Olst & Volst 2012, p. 544-549.

226 The BIBOB legislation forms the main point of departure.

227 Spanjaard 2004; Gemeente Amsterdam June 2004.

### Goal of the instrument

The legislation offers the local authorities the opportunity to develop and implement a tailor-made local policy. Its basis is Article 147, paragraph 1 of the Municipalities Act (*Gemeentewet*), which provides for the adoption of a general municipal by-law (*Algemene plaatselijke verordening*, APV). The main aim of the APV is to maintain public order and safety.<sup>228</sup> APVs are elaborations of higher laws, such as the Damocles Act discussed below,<sup>229</sup> and include general binding regulations (*algemeen verbindende voorschriften*).<sup>230</sup> Obviously, APVs cannot conflict with the higher laws.

### Scope of competence

The APV can include powers to enter a home without the inhabitant's permission (Article 149a Municipalities Act), regulate prostitution (Article 151a Municipalities Act), or designate a security risk area (*veiligheidsrisicogebied*) when there is an apparent or suspected disturbance of public order due to possession of illicit arms (Article 151b Municipalities Act). The Municipalities Act also regulates the power to place CCTV cameras (Article 151c Municipalities Act). The local authorities may include criminal sanctions (Article 154 Municipalities Act) as well as administrative sanctions (Article 154b and further Municipalities Act) in the APV. The Association of Dutch Municipalities (*Vereniging van Nederlandse Gemeenten*, VNG) has drawn up a model APV, which most municipalities have adopted.<sup>231</sup>

In addition to the provisions incorporated in the Municipalities Act, the local authorities can also include conditions regarding licences for pubs, restaurants, hotels, gambling arcades, etc. in the APV. The APV may also be used to prevent disturbances of public order in and around premises and in public areas, as well as hindrance caused by drug dealing. Finally, the APV is used to regulate public events as well as environmental provisions, such as a parking.

The local authorities may include reasons to close premises in the APV if narcotic drugs, illicit weapons or illegal gambling are discovered. Such conditions are incorporated in the APVs of Maastricht<sup>232</sup> and Amsterdam for example.<sup>233</sup> Recently, the local authorities in Amsterdam also proposed to amend the APV pertaining to prostitution. Prostitution has been legal in the Netherlands since 2000 and the City of Amsterdam regulated these activities by granting permits to prostitution businesses at a certain location, i.e. 'window

228 Van Alphen 2011, p. 294.

229 Van Daele et al. 2010, p. 124-129.

230 General binding provisions. This means that the decision in the ordinance applies not just for one individual but for all the inhabitants of that specific municipality.

231 [www.bestuurlijkhandhaven.nl](http://www.bestuurlijkhandhaven.nl); [www.vng.nl](http://www.vng.nl).

232 Van Daele et al. 2010 124-127; <http://decentrale.regelgeving.overheid.nl/cvdr/XHTMLoutput/Actueel/Maastricht/40110.html>.

233 Van Daele et al. 2010 124-127; [http://www.regelgeving.amsterdam.nl/algemene\\_plaatselijke\\_verordening\\_2008](http://www.regelgeving.amsterdam.nl/algemene_plaatselijke_verordening_2008).

prostitution'.<sup>234</sup> Since 2008, licences have also been required for escort services. The municipality now proposes to oblige operators to include measures to prevent and tackle human trafficking in their business plans. These measures include a ban on having prostitutes work two shifts a day at different windows. The manager of the company renting out the windows must be present during opening hours, and the prostitutes are obliged to take a language test to ensure that they are able to work independently. All of this is included in the permit requirements and non-compliance can result in withdrawal of the licence. Amsterdam, however, chose not to extend its regulatory oversight to cover individual prostitutes working from home.<sup>235</sup> The proposed adjustments to the APV are meant to 'normalize' the prostitution branch, as numerous studies have shown that sexual exploitation of prostitutes is common there.<sup>236</sup>

### Legal protection

When a municipality takes a decision based on a provision set in the APV, the Awb and the legal protection associated with it applies.

#### 8.3.4 *Closure and expropriation of premises*

In Maastricht, a city in the south of the Netherlands and close to the national borders with Germany and Belgium, drug dealing caused frequent disturbances of public order. In response, the municipal authorities established a 'flex team', which targeted drug tourists, dealers and users.<sup>237</sup> The team consists of municipal specialists in administrative law, building and rental law and the local APV. On 29 March 2010, the City reported that it had shut down five buildings for three months and an internet café for one year as a result of the flex team's work. The case began when neighbours complained about drug use and dealing in and around these premises. Based on these complaints, the flex team was able to enter the houses and found hard drugs present, resulting in their administrative closure.<sup>238</sup>

The competence to close and/or expropriate buildings depends on several administrative laws, of which the most important are the Municipalities Act (*Gemeentewet*), the Housing Act (*Woningwet*), the Expropriation Act (*Ontheffingswet*) and the Opium Act (*Opiumwet*).

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234 Algemene toelichting bij de APV, wijziging naar aanleiding van concept wijzigingen Prostitutiebesluiten.  
Found at <http://www.amsterdam.nl/zorg-welzijn/programma/algemene-artikelen/concept-apv/>.

235 Spapens & Rijken 2014.

236 Spapens & Rijken 2014.

237 Folder Flex Team, January 2011, via: [www.maastricht.nl](http://www.maastricht.nl).

238 [http://www.maastricht.nl/web/Home/Home/M\\_e\\_d\\_i\\_a\\_i\\_t\\_e\\_m-tonenop/Burgemeester-sluit-vijf-woningen-en-een-internetcafe.htm](http://www.maastricht.nl/web/Home/Home/M_e_d_i_a_i_t_e_m-tonenop/Burgemeester-sluit-vijf-woningen-en-een-internetcafe.htm).

The instrument can be applied when there is a violation of public order.<sup>239</sup> Below, we will first discuss the competences of closure and expropriation respectively.

### Closing of premises

Article 174a paragraph 1 of the Municipalities Act gives the mayor the competence to close buildings, non-publicly accessible rooms and land if public order is disturbed or, according to paragraph 2, if there is a risk of future disturbance.<sup>240</sup> The latter preventive measure can only be taken if a building has already been closed owing to misuse by its inhabitant and there are indications that that person will use the building next door in the same manner.<sup>241</sup>

Furthermore, the mayor has the competence to close buildings or rooms under Article 13b of the Opium Act (Damocles Act). This competence can be applied if narcotic drugs are sold, delivered or distributed in or around buildings, rooms or land.<sup>242</sup> This power also applies when the drug dealing itself does not cause nuisance.<sup>243</sup> This was the main reason to expand the Opium Act, because the aforementioned Article 174a did not apply to drug dealing in private homes.<sup>244</sup> An important limitation remains when it comes to cannabis nurseries, however, since Article 13b addresses only the selling, delivering or distribution of drugs and not their production.<sup>245</sup> Article 13b can be extended locally in an APV. Such APVs have been issued in Maastricht and Amsterdam and are referred to as the ‘Damocles policy’.<sup>246</sup> In these local policy provisions, the local authorities can elaborate on definitions such as ‘*lokale*’<sup>247</sup> or ‘*softdrugs*’, to determine what they mean in the local context and which administrative sanction they prefer in particular situations.<sup>248</sup>

Article 17 paragraph 1 of the Housing Act (former Article 97, not substantially amended)<sup>249</sup> also gives the Mayor and Municipal Executives the competence to close buildings whenever there is a threat to liveability or to health and if there is an obvious risk of the violation being repeated. An example of such a situation is the closure of a building in which a cannabis plantation has been established.<sup>250</sup> Article 17 Housing Act was added in the context of legislation regarding special measures to combat problems in metropolitan areas (*Wet bijzondere maatregelen grootstedelijke problematiek*),<sup>251</sup> which

239 Van Daele et al. 2010, p. 120.

240 Van Daele et al. 2010, p. 120-121.

241 Van Daele et al. 2010, p. 120-121.

242 Van Daele et al. 2010, p. 122.

243 Van Daele et al. 2010, p. 122.

244 Van Daele et al. 2010, p. 122.

245 *Kamerstukken II* 2006-2007, 30515, nr. 6, p. 3.

246 Van Daele et al. 2010, p. 124-127.

247 Premises.

248 Beleidsregels inzake de toepassing van artikel 13b Opiumwet, 16 April 2010, Gemeenteblad 2010, C. no. 46.

249 T&C Ruimtelijk Bestuursrecht, commentaar bij artikel 17 Woningwet via Kluwer Navigator.

250 Van Daele et al. 2010, p. 121.

251 *Staatsblad* 2005, nr. 726.

aimed to tackle fraudulent owners or tenants of buildings. This piece of legislation also enlarged the scope of Article 14 of the Housing Act and Article 77 of the Expropriation Act,<sup>252</sup> which will be dealt with below.

Article 14 of the Housing Act regulates aftercare when Articles 174, 174a of the Municipalities Act, 13b of the Opium Act or 17 of the Housing Act have been applied. The municipal executive can decide that the owner of the building must choose between two options. He can either give the use of the building to a person other than the one responsible for its closure (paragraph 1 sub a) or he can assign supervision of the building to a person or institution that works on the grounds where the building is located (paragraph 1 sub b).<sup>253</sup>

### **Expropriation of buildings**

If the competences assigned under Article 17 of the Housing Act, Article 174/174a of the Municipalities Act or Article 13b of the Opium Act have been used to close a building, the municipal executive can decide to expropriate it under Article 77 of the Expropriation Act, paragraph 1 sub 1 to 8. The decision to expropriate must be approved by the Crown under Article 79 of the Act. If application of Article 14 of the Housing Act has not resulted in lasting public order being restored around the building or the cessation of violations of Articles 2 and 3 of the Opium Act, expropriation is permitted under sub 7. The same is true for Article 17 of the Housing Act in conjunction with Article 77 paragraph 1 sub 8 of the Expropriation Act. Expropriation can also take place as a consequence of spatial plans and building plans, according to paragraph 1 sub 1 and 2 of the Act.<sup>254</sup> In addition, under sub 5 expropriation is possible when a building is vacated and inhabitable.

### **Legal protection against decisions to close or expropriate**

Article 174a provides for a decision by an administrative authority to close a building. Article 174a paragraph 4 states that before a final closure decision can be taken, the person affected can take measures within a set period of time to end the disturbance of public order. After that, the administrative authority can issue its closure decision. The person affected by this decision, the interested party, can then lodge an objection to that decision with the same administrative authority.<sup>255</sup> After the objection, appeal is possible before a court of first instance, and that decision may also be appealed before the ABRvS, under the regime of the Awb.<sup>256</sup>

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252 Van Daele et al. 2010, p. 121.

253 Van Daele et al. 2010, p. 121.

254 Article 77 paragraph 1 sub 1, 3 and 6 Expropriation Act.

255 Van Daele et al. 2010, p. 127.

256 Van Daele et al. 2010, p. 127.



The mayor is also competent to close buildings grounded on Article 13b *Opium Act* by means of an order for administrative coercion. The Awb is applicable,<sup>257</sup> which means that the decision needs to be motivated and announced, the interested party can be heard and the provisions regarding objection and appeal are applicable.<sup>258</sup> For the sanction as imposed by Article 13b of the *Opium Act*, the safeguards of Article 6 ECHR are not applicable.<sup>259</sup>

With regard to expropriation, according to Article 80 of the Expropriation Act, Chapter 3.4 of the Awb is applicable. This means that the most interested party will receive the documents regarding the expropriation. Furthermore, they will be able to put forward their views in accordance with Article 3:16 paragraph 1 Awb. They can send their objections to the Crown, which has to send the draft decision to the Council of State, after which it will be published in the Government Gazette (*Staatscourant*). After publication, proceedings before the court of first instance may commence, in which the court can examine whether the expropriation procedure was unlawful. If this is the case, the owner is fully remunerated.<sup>260</sup> There is no appeal against the verdict of the court of first instance; however, appeal in cassation remains a possibility.<sup>261</sup>

#### 8.4 SEIZING OF ASSETS

In the Netherlands, seizure of assets is arranged under criminal law<sup>262</sup> and will therefore not be discussed in this country report. Based on previous research,<sup>263</sup> there are indications that the seizing of assets is not regulated under criminal law in other European countries but under administrative and/or civil law. The foregoing will be discussed in the other country reports.

257 Van Daele et al. 2010, p. 128.

258 Van Daele et al. 2010, p. 128.

259 ABRvS 5 January 2005, nr. 200401581/1; ABRvS 29 March 2006, nr. 200508042/1; ABRvS 10 June 2009, nr. 200807739/1/H3.

260 Van Daele et al. 2010, p. 129.

261 Van Daele et al. 2010, p. 129.

262 More specifically under Article 36e of the Dutch Criminal Code.

263 12798/12 COSI 62 ENFOPOL 242 GENVAL 54; 10899/11 JAI 380 COSI 44 CRIMORG 77 ENFOPOL 179.

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## 9 THE ADMINISTRATIVE APPROACH IN POLAND

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### 9.1 INTRODUCTORY REMARKS

#### 9.1.1 Background

Poland became a democratic state in 1989 when the communist regime was overthrown. From that year, Poland started to build a legal system based on the rule of law and the free-market economy. In 1997, the new Polish Constitution, in which economic freedom is a cornerstone, entered into force. Article 20 of the Polish Constitution<sup>1</sup> provides that: 'A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland.' In 2004, Poland became a Member State of the European Union.

All legislation concerning economic activities has been adopted in the past 25 years. On 1 January 1999 the law introducing local self-government and a new administrative division entered into force. This legislation replaced the two-stage administrative division in Poland with a three-stage one, consisting of voivodships (*województwa*), counties (*powiaty*), and communes (*gminy*). At present, Poland comprises 16 voivodships and 314 counties. The administrative power in a voivodship is exercised by:

1. local authorities: the voivodship council – a body elected for a period of four years – and the Marshal Office (*Urząd Marszałkowski*), led by the Marshal (*Marszałek*);
2. the central government bodies: the Voivodship Office led by the Voivode (*Wojewoda*), appointed by the Prime Minister.

The county council governs the counties. The council is elected in universal and direct elections for a term of four years. The executive power is vested in the office of the county (*starostwo*) and led by the governor (*starosta*), who is elected by the county council. In Poland, 65 cities have counties' rights.

Commune councils govern the communes. The commune councils are also elected in universal and direct elections and installed for a four-year term. The executive power in communes is vested in mayors. They are called *wójt* in village communes, *burmistrz* in

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1 Act of 2 April 1997, Official Journal of 1997, no. 78, item 483, as amended.

communes consisting of villages and towns or towns only, and *prezydent* (president) in communes consisting of large cities. Mayors are elected directly.

#### 9.1.2 *Administrative measures to combat organized crime – overview*

Because the market-based economy was only introduced in 1989, there is no long-lasting legal tradition to prevent and combat crimes through administrative measures in Poland. Instead, a traditional approach based on criminal law prevails. Poland imposes penal sanctions on both criminal offences (crimes) and fiscal offences (fiscal crimes). This is based on the new Criminal Code of 1997, which entered into force on 1 September 1998, and on the Fiscal Penal Code of 1999, which covers both fiscal criminal procedure and fiscal offences. Petty offences (*wykroczenia*) are regulated separately in the Petty Offences Code of 1971.

In recent years, however, legislation has been introduced to regulate specific economic activities, including with the intention of preventing crime. For example, in 2009 the Polish Parliament adopted a new gambling law that imposed stricter requirements on gambling operators. At that time, this extension of the powers of control of administrative bodies was justified by the fact that the gambling sector was being misused for money laundering and fraud. Furthermore, amendments to the Act on Counteracting Drug Addiction introduced administrative measures to combat new psychoactive substances. This was deemed necessary because these substances were freely available in specialized shops, even though they can be hazardous to a person's health. In this case, the legislative process by which this new law was adopted took little time.<sup>2</sup>

Administrative measures to regulate economic activities, which may also be applied to prevent or repress criminal activity, break down into seven groups:

1. preventive screening and monitoring of persons applying for a posting or job in sectors susceptible to criminal infiltration;
2. preventive screening and monitoring of applicants (persons and legal entities) for licences, permits, tenders and subsidies;
3. measures to control business activities with reference to: a) the proper use of a permit or licence and b) eligibility of persons to operate the business;
4. powers to withdraw licences and permits and to close the business if the requirements are not met;
5. powers to impose administrative penalties on those who engage in a regulated economic activity without an appropriate licence or permit;

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2 Cichomski & Kumanek 2013, p. 153-154.

6. special administrative powers assigned to financial administrative bodies allowing them to gather information on suspicious transactions and to suspend the transaction or block an account;
7. the administrative power of the police to grant permits for the possession of firearms.

The administrative bodies responsible for screening and monitoring procedures as well as inspections have access to information concerning criminal activities stored in national registers. We describe the National Crime Register and the National Centre of Criminal Information below.

It should be stressed that in Poland it is not possible to seize assets of criminals based on a decision by an administrative body. Article 46 of the Constitution states that 'Property may be forfeited only in cases specified by a statute, and only by virtue of a final judgment of a court'. However, it is possible to seize illegal goods outside the framework of criminal procedure. To begin with, for example, the court competent to adjudicate civil cases<sup>3</sup> decides on the forfeiture of drugs, psychotropic substances and drug precursors at the request of the Voivodship Pharmaceutical Inspector or the Chief Pharmaceutical Inspector of the Polish Army. This competence is based on Article 34 (3) of the Act of 29 July 2005 on Counteracting Drug Addiction<sup>4</sup> (hereafter referred to as the Act on CDA).

Second, with reference to new psychoactive substances, the same Act allows the competent sanitary inspector to impose an administrative decision ordering the withdrawal of the substance from the market and its destruction at the expense of its holder.<sup>5</sup> As mentioned above, this competence was introduced only recently in response to the production and sale of new psychoactive substances.

Third, in certain situations, bank accounts may be blocked temporarily by administrative decision (see Section 9.4).

Finally, tax law includes administrative provisions that produce an outcome similar to the seizure of illegal incomes. Pursuant to Article 30 (1) item 7 of the Act of 26 July 1991 on income tax from natural persons, incomes from undisclosed sources are subject to a 75% income tax rate. This tax may be imposed together with a criminal penalty for a fiscal crime of non-disclosure of income following a ruling by the Polish Constitutional Court that the principle of *ne bis in idem* is not violated by the cumulative application of both measures. The tax authorities have considerable administrative powers to investigate undisclosed sources of income. In particular, they have access to case-files of pending

3 See Łucarz & Muszyńska 2013, paragraph 4.

4 Consolidated text published in: Official Journal of 2012, item 124, with amendment.

5 Article 44c of the Act on CDA in conjunction with the Article 27c of the Act of 14 March 1985 on the State Sanitary Inspectorate (consolidated text published in: Official Journal of 2011, no. 212, item 1263, with amendments.

criminal proceedings against the taxpayer or other persons.<sup>6</sup> On 18 July 2013, however, the Polish Constitutional Court ruled that the legal framework for determining undisclosed sources of income is partly in violation of the Polish Constitution.<sup>7</sup> As a result, the legislator will have to re-regulate the tax procedure for establishing undisclosed incomes.

This country report is structured as follows. To begin with, the remainder of this section briefly introduces the two criminal registers mentioned above and identifies the topics relevant for further analysis. Second, it describes the obligations to report bans on economic activities imposed in a final decision by a court or other procedural body. Third, it presents the provisions in the Code of Criminal Procedure that regulate the exchange of information between procedural bodies and administrative authorities.

Section 9.2 addresses the screening of natural persons who apply for a post in sectors susceptible to criminal activities. Section 9.3 is devoted to administrative measures concerning specific business activities as listed in items 2-3 above. Section 9.4 covers the measures indicated in items 4 and 5 above. Finally, Section 9.5 addresses other administrative measures, as listed in items 6 and 7 above.

The report does not include the administrative competences of the tax and customs authorities in the context of the evasion of taxes and customs duties. The powers of these two public bodies are meant to protect the fiscal interests of the state and to gather evidence for subsequent criminal proceedings concerning fiscal offences or petty fiscal offences. Instead, this report is limited to administrative measures that may serve to prevent or combat crime.

### 9.1.3 *The National Crime Register, the National Centre of Criminal Information and other sources of information for screening and monitoring of persons/entities*

#### 9.1.3.1 **The National Crime Register**

The procedure of screening and monitoring of natural persons or collective entities running a business, as well as natural persons applying for a post or job, requires access to information about the applicant's past criminal activities, confirmed in a final judgment by the competent criminal court. The National Crime Register (hereafter referred to as the NCR) holds data on final convictions, imposed sentences and penal measures (*środki karne*). In addition, the NCR contains personal data on individuals who are detained on remand in the course of criminal proceedings or persons wanted by the police and other prosecutorial bodies.

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<sup>6</sup> See Ćwikowski 2012, p. 290-291.

<sup>7</sup> Judgment SK 18/09, published in Official Collection of Judgments of the Constitutional Court, Series A – OTK-A 2013, no. 6, item 80.



The National Crime Register Information Office, which is part of the Ministry of Justice, administrates the NCR.<sup>8</sup> The NCR contains information on persons:

1. who have been convicted in a final judgment of criminal and fiscal offences;
2. against whom the proceedings concerning a criminal or fiscal offence were conditionally discontinued in a final judgment;
3. against whom the proceedings concerning a criminal or fiscal offence were finally discontinued under amnesty law;
4. Polish citizens convicted in a final judgment by courts in another EU Member State;<sup>9</sup>
5. against whom security measures (*środki zabezpieczające*) were adjudicated in a final decision issued in proceedings concerning a criminal or fiscal offence;
6. minors on whom educational, correctional or educational-therapeutic measures were imposed in a final decision issued in special proceedings conducted against minors committing a criminal act;
7. who have been sentenced in a final judgment to an arrest penalty for a petty offence;
8. who are subject to a 'wanted notice';
9. who are detained on remand;
10. who are minors placed in shelters for minors.

The NCR also contains data on collective entities sentenced in a final judgment to a fine, forfeiture, and a published ban.<sup>10</sup>

### Access to the NCR

Pursuant to Article 6 of the Act on NCR, a significant number of persons and institutions are entitled to obtain information from the NCR. In the context of a screening procedure, information may be disclosed, *inter alia*, to the following bodies:

- public prosecutors, the police and other government bodies competent to conduct preliminary proceedings concerning criminal and fiscal offences as well as petty offences;
- the Agency of Internal Security, the Military Counterintelligence Service, the Customs Service and the Central Anticorruption Office, to the extent necessary to carry out the tasks entrusted to them by law;

8 Pursuant to Article 1 paragraph 2 of the Act of 24 May 2000 on the National Crime Register. Consolidated text published in: Official Journal of 2012, item 654, with amendments.

9 In 2012 the Act on National Crime Register was amended in order to implement Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS); information about convictions of Polish citizens by courts of other Member States of the EU are transmitted through ECRIS, a decentralized IT architecture; all EU countries convicting a non-national are obliged to send information on this conviction immediately for registration in the NCR.

10 Collective entities may be held responsible for criminal acts on the basis of the Act of 28 October 2002 on the liability of collective entities for acts prohibited under penalty. Official Journal of 2002, no. 197, item 1661, with amendments.

- tax intelligence office (inspectors of the Ministry of Finance or Organs of Fiscal Control), to the extent necessary for the fulfilment of its statutory duties;
- the Chairman of the Financial Supervision Commission or the latter's representative, to the extent necessary for the exercise of their functions;
- government and local government administrative authorities or other public bodies, to the extent necessary for the execution of their tasks as determined by statutory law;
- employers, to the extent necessary for the employment of staff, if the law requires that an employee must be free of convictions for a criminal offence and must not have been deprived of public rights in a criminal judgment if that employee is obliged to exercise such rights; for determining whether the employee is entitled to occupy a particular post, to exercise a profession or to conduct certain business activities;
- legal entities and entities not being legal persons but having legal capacity. These entities may apply for information from the NCR if the law requires that their board members or shareholders have not been convicted of a criminal offence.

As a rule, the information obtained from the NCR may be used only for the purpose for which it was granted. However, in order to prevent an immediate and serious threat to public safety, the institutions mentioned above can use the information, with the exception of employers, legal entities and other entities having legal capacity outside the procedure for which it was granted.

Criminal information stored in the NCR is also available to the courts administrating the National Court Register.<sup>11</sup> Pursuant to Article 20a of the Act on NCR, information relevant for the National Court Register is forwarded to the courts that register persons and entities through the NCR ICT system either on request or automatically (*ex officio*), immediately after the NCR has received this data. Information sent automatically includes an individual's personal data, his/her identification number, the date of the judgment/decision and the date on which it became final, the court that issued it, the offence, all penalties and penal measures imposed on the person, information on probation measures and their execution.

Article 21a of the Act on the National Court Register determines the scope of the information sent automatically from the NCR to the National Court Register.<sup>12</sup> It concerns information:

1. on convictions for offences against the protection of information and trading in currencies and securities indicated in the Criminal Code, as well as information on convictions for a number of offences regulated in the Code of Commercial Companies

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11 The functions of the National Court Register are described in Section 9.4.1.

12 Consolidated text published in: Official Journal of 2013, item 1203.

with regard to persons indicated in Article 18 § 2 of the Commercial Companies Code.<sup>13</sup> This concerns members of the management and supervisory boards, the audit commission or a receiver;

2. on penal measures referred to in Article 39 (2) of the Criminal Code (disqualification from specific posts, prohibition to exercise a specific profession or to engage in specific economic activities) concerning persons who are subject to entry or have been included in the entrepreneurs' register (Sections 2, 5 and 6), the register of associations, other social and professional organizations, foundations, public healthcare institutions;
3. on convictions for an offence prosecuted *ex officio* or for a fiscal offence regarding persons who are subject to entry or have been entered as members of the management or a supervisory authority of a public benefit organization;
4. on convictions for an property offence, document fraud or a fiscal offence regarding persons who are subject to entry or have been entered as members of the management and supervisory boards of cooperative savings and loans companies.

Pursuant to Article 106a and 107 of the Criminal Code, information on a conviction can be expunged from the register of offenders under the following conditions:

- For a sentence of imprisonment, the expunging of the sentence takes place *ex officio* (by force of law) ten years after it is served or remitted, or from the time the statutes of limitation bar its enforcement.
- At the request of the person sentenced, the court may order the sentence to be expunged after five years if the person sentenced has respected the legal order during this period, and if the prison sentence did not exceed three years.
- In the event of a sentence of life imprisonment, the sentence is expunged by force of law ten years after it has been served or remitted, or from the time the statutes of limitation bar its enforcement.
- Other sentences (fine, restriction of liberty) are expunged five years after having been served or remitted.
- If a penal measure was imposed, the conviction may not be expunged before the sentence has been carried out or remitted or before its enforcement is barred by the statutes of limitation.
- A sentence of imprisonment (if not suspended) for offences against sexual freedom and decency is not expunged if the victim was a minor under the age of 15.<sup>14</sup>

Pursuant to Article 14 (2) of the NCR in conjunction with Article 68 § 4 of the Criminal Code, information on conditional discontinuation of the proceedings will be removed

<sup>13</sup> The Act of 15 September 2000; Official Journal of 2013, item 1030.

<sup>14</sup> I have used the English translation of the content of the Criminal Code provided in: Faulkner 2012.

from the NCR six months after termination of the probation period (which may last from one to two years).

### 9.1.3.2 The National Centre of Criminal Information

The National Centre of Criminal Information (hereafter referred to as the NCCI) gathers and stores information on pending criminal proceedings and on the application of special investigative methods. It also contains other data relevant for assessing the risk a person may pose to public order and safety. If a person is a subject of a pending criminal procedure, this may in specific cases also bar him or her from obtaining a licence or a post/job, although this may seem to conflict with the principle of presumed innocence following from Article 42 (3) of the Polish Constitution.

The National Centre of Criminal Information is part of the National Police Headquarters. Its legal basis is the Act of 6 July 2001 on the gathering, analysis and transmission of criminal information.<sup>15</sup>

The information gathered by the NCCI covers, *inter alia*, all proceedings in cases of criminal and fiscal offences, information on all persons suspected of having committed such offences and persons subject to special investigative methods such as covert surveillance. It also contains information on objects used to commit a criminal offence or lost in connection with the offence, information about entrepreneurs, civil partnerships, foundations, or associations suspected of being used to commit a crime as well as information about bank or securities accounts for which there is a reasonable suspicion that they have been used to commit a crime or to collect proceeds of crime.<sup>16</sup> The NCCI keeps information on persons suspected of a criminal or a fiscal offence for 15 years from the moment of their registration.<sup>17</sup>

Access to the NCCI is much more limited than to the NCR. *Inter alia*, public prosecutors, the police, customs authorities, tax authorities, the fiscal intelligence unit, the authorities of financial information<sup>18</sup> and public administrative authorities competent in matters concerning citizenship, foreigners and repatriation have access to NCCI information and can use it for the following purposes:<sup>19</sup>

- to detect and prosecute offenders and prevent and combat crime;
- to establish whether the granting of a concession or permit to conduct a gambling business poses a threat to national security or public order.

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<sup>15</sup> Consolidated text published in: Official Journal of 2010, no. 29, item 153, with amendments.

<sup>16</sup> Article 13 (1) of the Act on NCCI.

<sup>17</sup> Article 14 (1) of the Act on NCCI.

<sup>18</sup> This concerns public bodies described in paragraph 9.5.1.

<sup>19</sup> Article 19 of the Act on NCCI.

### 9.1.3.3 Other sources of information for screening and monitoring of persons/entities

Judicial authorities are also obliged to inform the appropriate public bodies of preventive measures listed in Article 276 of the Code of Criminal Procedure<sup>20</sup> that have been imposed on suspects/accused persons in pending criminal proceedings. Under this provision, the suspect or accused may be suspended from his professional duties or barred from exercising his profession, and he or she may be ordered to refrain from certain professional activities or from driving a particular type of vehicle.

Furthermore, criminal courts are obliged to inform the appropriate organs and institutions about final judgments resulting in a penal measure listed in Article 39 (2) of the Criminal Code.<sup>21</sup> Pursuant to Article 180 of the Code on Execution of Criminal Sentences (CECS),<sup>22</sup> the court sends a copy of the judgment to the competent administrative authority and to the employer or institution for which the convicted person performed his profession if a final judgment results in that person being barred from specific posts or banned from exercising a specific profession. If the convicted person holds a managerial position, the court also sends a copy of the judgment to the competent supervisory body.

Article 181 of the CECS concerns similar duties by the criminal courts with reference to final judgments imposing a penal measure prohibiting economic activity. The criminal courts are obliged to send a copy of such a judgment to the administrative authority competent in the place of residence of the convicted person or in the place of business covered by the prohibition.

If, in the exercise of his profession or the conduct of certain economic activities, the person convicted belongs to a professional association or other business organization, for example the Polish Chamber of Commerce, the criminal court must notify these that he/she has been barred from the specific profession or particular business.<sup>23</sup>

### 9.1.4 *Legal basis for exchange of information between administrative authorities and organs conducting criminal proceedings*

The legality principle governs Polish criminal proceedings. Thus, in accordance with Article 304 of the Code of Criminal Procedure, all citizens have the duty to notify the public prosecutor or other investigative authorities if they have knowledge of an offence committed *ex officio*. However, only moral sanctions apply when a person fails to comply

20 Act of 6 June 1997; Official Journal of 1997, no. 89, item 555, with amendments. Hereafter referred to as 'the CCP'.

21 Act of 6 June 1997; Official Journal of 1997, no. 88, item 553, with amendments. Hereafter referred to as 'the CC'.

22 Act of 6 June 1997; Official Journal of 1997, no. 90, item 557, with amendments.

23 Article 183 of the CECS.

with this duty, except for the most serious offences indicated in Article 240 of the Criminal Code, such as murder and terrorist offences. Failing to report such offences is subject to imprisonment for a maximum of three years.

The requirements for public and local government institutions, including all administrative bodies, are more stringent. Pursuant to Article 304 § 2 of the CCP, if a public body and local government institution, in connection with their duties, discovers an offence committed *ex officio*, they are legally obliged to report this immediately to the public prosecutor or the police. In addition, they must take action to prevent the loss of traces and evidence until the competent authority intervenes. The obligation to notify falls to the head of the entity or a staff member who is obliged to do so in accordance with internal rules. Failure to notify constitutes an offence punishable by a prison sentence of up to three years.<sup>24</sup>

The Code of Criminal Procedure also regulates the notification procedure that allows law enforcement agencies to respond to irregularities in the functioning of administrative authorities. Pursuant to Article 19 of the CCP, if law enforcement agencies detect a serious transgression in the activities of a state, local government or community institution and particularly when this transgression encourages criminal offences, they are obliged to inform the supervisory authority and if necessary also its controlling authority. The police notify the public prosecutor of the identified transgression.

Furthermore, within a defined time limit, law enforcement agencies may request explanations and information about measures applied in order to prevent similar transgressions in the future. If they receive no explanation within the prescribed time limit, the head of the relevant authority can be fined up to a maximum of PLN 10,000. That decision can be subject to interlocutory appeal. If the public prosecutor has issued the fine, the district court will examine the appeal.

Article 21 of the Code of Criminal Procedure includes a further obligation to provide information. This provision states that supervisors must be notified immediately when criminal proceedings have been initiated against persons employed in state, local government and community institutions, against school pupils and students at schools and colleges, as well as against soldiers. The public prosecutor is also required to notify persons other than those referred to above about proceedings initiated against public officials if the public interest so requires.

Article 156 § 5 *in fine* of the CCP allows administrative authorities to request access to the case file of pending criminal proceedings. During the preparatory stage of the proceedings (i.e. in the course of investigation or enquiry), the public prosecutor can only grant access to the case file 'in exceptional cases.' The Code of Criminal Procedure does

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24 I have used the English translation of the content of the Code of Criminal Procedure provided in: Adamczyk 2014.

not elaborate on the prerequisites for granting (or refusing) access to the case file to persons or entities other than parties in the criminal proceedings. Thus, the decision on this issue is entirely at the discretion of the public prosecutor.

In the course of the judicial proceedings, the president of the court competent to examine the case may grant access to the case file.<sup>25</sup>

## 9.2 SCREENING AND MONITORING OF PERSONS APPLYING FOR A POST/JOB IN SECTORS VULNERABLE TO CRIMINAL ACTIVITIES

### 9.2.1 Introduction

As mentioned above, administrative bodies and employers may obtain information from criminal records when a person applies for a post/job if such a requirement follows from the law.

In the Polish legal system, there is no unified and standardised requirement of ‘good conduct’ for persons applying for a post/job in public or private sectors vulnerable to misuse by criminals. Instead, many different laws govern specific spheres of professional activity and include various requirements regarding the applicant’s background. We can divide these requirements into three groups:

1. a general requirement that the candidate has no record for a criminal or fiscal offence;
2. the requirement that the candidate has no record for particular categories of criminal or fiscal offences;
3. the requirement that the candidate has no record for a criminal or fiscal offence and that no criminal proceedings against him/her are in progress at the time of the application for the post/job.

The NCR does not register past criminal proceedings that were ultimately discontinued. These are however kept in the NCCI for a period of 15 years from the time of their registration. As mentioned above, natural persons who work in a specific job or post may be screened and barred from that job/post if they no longer meet the requirements.

In the past two years, Poland has seen a hot political debate on the large number of regulated professions. It was argued that the excessive regulatory powers of various administrative organs constitute a serious obstacle to the country’s economic development and are causing growing unemployment. In 2013, a law was adopted that reduced or

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<sup>25</sup> Article 156 § 1 *in fine* of the CCP.

abolished the requirements for access to regulated professions.<sup>26</sup> In addition, some professions for which a declaration of good conduct was required before 1 January 2014 were deregulated. For example, property agents now do not need a professional licence and their criminal record is no longer screened.

Even after the recent changes, however, many legal acts still require proof of good conduct. The next part of this report is limited to a few examples of laws concerning the public and private sector that are particularly relevant in crime prevention.

### 9.2.2 *Public servants and persons exercising public duties*

A post or job in the public sector traditionally requires proof of good conduct. Screening of criminal records applies to all candidates taking part in local elections as well as to candidates for a parliamentary election. Persons convicted and sentenced to imprisonment for an intentional (fiscal) crime, investigated *ex officio*, are not eligible for election.<sup>27</sup> Equal or similar requirements apply to prospective prosecutors, judges, lawyers, notaries, legal advisers and other persons occupying high-level positions in public bodies.

The requirements for employees of public bodies are particularly stringent for those who perform duties connected with public order and public safety. For example, officers of the Border Guard Service are regularly screened and will have their duties suspended if criminal proceedings have been initiated against them related to an intentional criminal or fiscal offence, prosecuted *ex officio*. The same applies to officers detained on remand. Suspension of professional duties lasts for the whole period of detention.<sup>28</sup> Officers of the Border Guard Services are dismissed from the service on final conviction for an intentional criminal or fiscal offence prosecuted *ex officio*. They may be dismissed from office on final conviction for other offences.<sup>29</sup> Similar requirements apply to officers of the Customs Service,<sup>30</sup> the Prison Service and other services empowered with public security tasks. Access to all the above-mentioned posts is closed to candidates convicted of a criminal or fiscal offence. If the criminal record is expunged and obscured, the relevant persons may once again apply for such posts.<sup>31</sup>

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26 Act of 13 June 2013 amending acts regulating certain professions, Official Journal of 2013, item 829, in force since 1 January 2014. As stated in the written justification for this Act, access to 380 professions was subject to various administrative requirements. The Act concerns over 20 professions. Generally, the Act eased access to regulated professions by, *inter alia*, reducing requirements to pass exams, and by exempting certain groups of persons with professional experience from the requirement to undergo professional training.

27 Article 11 § 2 (1) of the Election Code, Official Journal of 2011, no. 21, item 112, with amendments.

28 Article 43 of the Act of 12 October 1990 on the Border Guard, Official Journal of 2011, no. 116, item 675.

29 Unintentional crimes – Article 45 of the Act.

30 Article 76 and 103 of the Act of 27 August 2009 on Custom Service, Official Journal of 2013, item, 1404.

31 See paragraph 9.1.3.



Persons working with children, such as teachers in public schools and kindergartens, must have a clean criminal record. They will also be suspended immediately from their duties if they are suspected of having committed a criminal offence to the detriment of a child. Suspension may follow on suspicion of another crime. If the suspect is a teacher, the school's director takes this decision.<sup>32</sup> If the school director is suspected, this responsibility falls to the local administration responsible for administering the public schools.

### 9.2.3 *Private sector: persons requiring a professional licence*

A person who wants to work in professions sensitive to public order and public safety must obtain a professional licence that proves he is qualified. This allows him to be employed, but he requires a separate licence to start his own business.<sup>33</sup> A professional licence is required by detectives, taxi drivers and persons employed by entrepreneurs providing physical or technical protection of persons or property.<sup>34</sup>

#### 9.2.3.1 **The professional licence for detectives**<sup>35</sup>

A detective licence may be granted to a person who: 1) is not suspected of having committed an intentional criminal or fiscal offence; 2) has not been convicted for such offences in a final judgment by a competent court; 3) has not been dismissed for disciplinary reasons from the police or other public institutions competent to conduct criminal proceedings or from a public administrative body in the past five years; 4) has obtained a positive referral from the competent police department.<sup>36</sup>

The detective licence is issued by the competent Voivodship Police Commander.<sup>37</sup> Legally, this is an administrative decision. The licence will be suspended if criminal proceedings are initiated against the detective for criminal offences against the interests of the state, crimes against the life and health of persons, property crimes, economic crimes and

32 Articles 10 (5) and 83 of the Act on Teacher's Charter (the Act of 26 January 1982, Official Journal of 2006, no. 97, item 674).

33 The screening of natural persons upon their starting an economic activity is discussed in the third section of the Report.

34 See: Sub-section 3.1.1.3. A professional licence is also required in other private sectors that are less susceptible to criminal activities. For example, property appraisers are registered in the special register held by the Ministry of Infrastructure and Development. Persons convicted of the following offences cannot be entered into this register: offences against the activities of state and local government, offences against the administration of justice, offences against the credibility of documents` (involving the falsification of documents and using falsified documents), offences against property, offences against trade and offences against money and securities, or for fiscal offences (Article 177 (1) of the Act on Real Estate Management, Official Journal of 2010, no. 102, item 651, with amendments).

35 The Act of 6 June 2001 on detective services, Official Journal of 2002, no. 12, item 110.

36 Article 29(1) items 5-8 of the Act of 6 June 2001 on detective services.

37 Article 35 (1) of the Act of 6 June 2001 on detective services.

crimes against freedom. The licence may be suspended if criminal proceedings are initiated against the detective for an intentional criminal or fiscal offence, other than those listed above.<sup>38</sup> The Minister of Interior Affairs administrates the register of licensed detectives.<sup>39</sup>

### 9.2.3.2 The professional licence for taxi drivers<sup>40</sup>

Pursuant to the Act on road transport, taxi drivers also need a licence. Prospective taxi drivers are required to have a clean criminal record with regard to offences against life and health and sexual freedom and decency as well as other offences if the sentence imposed included a ban on exercising the profession of driver.<sup>41</sup> The competent local mayor grants, changes or withdraws the licence.<sup>42</sup> The requirement of 'good conduct' remains after the licence has been granted.<sup>43</sup>

Persons applying for a taxi driver's licence must submit a document issued by the NCR confirming their good conduct or a written declaration that they have no criminal record. Submitting a false declaration is a criminal offence. Furthermore, administrative authorities and employers can request information from the NCR, if the law requires a declaration of good conduct in relation to a given post. The criminal courts are obliged to inform the appropriate authorities about relevant final judgements or pending proceedings.

## 9.3 THE LEGAL FRAMEWORK FOR THE SCREENING AND MONITORING OF NATURAL PERSONS (WITH REFERENCE TO ECONOMIC ACTIVITIES)

### 9.3.1 Introduction

In order to discuss the screening and monitoring procedure in Poland and the specific instruments of the administrative approach to combatting crime, we must first describe the specifics of doing business in Poland. The majority of administrative instruments that could be used to combat serious and organized crime fall within the realm of business regulation. Local and central administrative authorities are equipped with specific instruments to supervise and regulate the business activities of citizens in selected areas. As in the two regulated professions presented in the previous section, certain branches of economic activity must comply with specific requirements (limitations) because of their

38 Article 38 (1) and (2) of the Act of 6 June 2001 on detective services.

39 Article 40 (1) of the Act of 6 June 2001 on detective services.

40 The Act of 6 September 2001 on road transport, consolidated text published in: Official Journal of 2013, item 1414, with amendments.

41 Article 6 (1) b of the Act of 6 September 2001 on road transport.

42 Article 7 (4) item 3 of the Act of 6 September 2001 on road transport.

43 See the judgment of the Highest Administrative Court of 28 September 2012, II GSK 1548/11, published in: electronic database: Legalis, no. 538071.

importance to the national economy and their vulnerability to exploitation for criminal purposes.

Pursuant to Article 22 of the Constitution, all limitations on the freedom of economic activity must be based on statutory law and can only be imposed if the public interest so requires.<sup>44</sup> The concept of 'public interest' is typically general in nature. It allows the legislator the right and the duty to select specific economic activities and introduce appropriate restrictions on the running of a business in these areas.<sup>45</sup> Furthermore, Articles 22 and 51<sup>46</sup> of the Constitution allow for the screening and monitoring of natural persons who undertake or wish to undertake specific economic activities.<sup>47</sup> The Act of 2 July 2004 on the Freedom of Economic Activity (hereafter referred to as the FEA Act) provides the administrative authorities with the appropriate competences to control entrepreneurs.<sup>48</sup>

If a natural person or a collective entity wants to start a business, irrespective of regulatory requirements, he must first qualify as entrepreneur and as such be included in two separate registers.<sup>49</sup> After a natural person obtains the status of an entrepreneur, his criminal record is checked only when specific regulations require a clean record.<sup>50</sup>

Different rules apply to legal entities that are commercial capital companies – a joint-stock company or a limited liability company. Pursuant to Article 18 § 2 of the Code of Commercial Partnerships and Companies, a person convicted in a final judgment for offences such as document fraud, property crime and a number of offences indicated in the Commercial Code cannot be a member of the management or supervisory board of such companies. Information about convictions for these offences is sent automatically from the NCR to the National Court Register. In the cases mentioned above, members of the management and supervisory boards will be dismissed from their function *ex lege*, based on Article 18 § 2 of the Code of Commercial Partnerships and Companies.

The ban on exercising these functions stands for a minimum of three years and is lifted five years from the day after the conviction became final. Pursuant to Article 18 § 4 of the Code of Commercial Partnerships and Companies, a convicted person may appeal to the court that issued the judgment for a release from the ban on performing functions in a commercial company, or to shorten the period of the ban, within three months of its becoming final. However, this does not apply to offences committed intentionally. Some businesses, such as a bank or a casino, can only be operated as a joint-stock company. Here, the convicted person is barred from the management or supervisory board of such

44 Banaszak 2009, p. 137.

45 Bąkowski 2007, p. 122-123.

46 Article 51 of the Constitution reads as follows: No one may be obliged, except on the basis of statute, to disclose information concerning his person data.

47 Skrzydło 2013.

48 Official Journal of 2004, no. 173, item 1807, with amendments.

49 For details see Section 9.4.1 below.

50 See for instance the Act on Waste. See Section 3.1.3.4.

a company if the offence is indicated in Article 18 § 2 of the Code of Commercial Partnerships and Companies. If a convicted entrepreneur chooses to set up a capital company, for example a limited liability company, to engage in another economic activity, Article 18 of the Code of Commercial Partnerships and Companies applies even if the activity does not require a declaration of good conduct as such.

The remainder of this section is structured as follows. To begin with, Section 9.3.1 presents basic information on the FEA Act and the general rules of conducting business in Poland. Sections 9.3.2.1 to 9.3.2.3 discuss the regulation and control of natural and legal persons in specific economic sectors. These topics are presented only to the extent necessary to analyse the screening and monitoring instruments (which are described in Section 9.4). Finally, Section 9.3.3 addresses government tenders.

### 9.3.2 *The Act on the Freedom of Economic Activity (FEA). General remarks*

The FEA Act sets forth basic rules for undertaking, conducting and terminating economic activities within the territory of Poland and the responsibilities of public administrative authorities in this area.

One of the basic rules defined in the FEA Act is the principle of equality. According to Article 6 (1), everyone is free to undertake, conduct and terminate an economic activity under equal rights and pursuant to the terms and conditions mentioned in the law. Public administrative authorities cannot impose requirements or conditions on natural persons or legal entities that wish to engage in an economic activity other than those provided for by law, particularly concerning the submission of documents or the disclosure of information.<sup>51</sup> Article 18 of the FEA Act lists the obligations for entrepreneurs and *inter alia* limits the principle of equality. Entrepreneurs must meet with all requirements set for a given economic activity, in particular those related to the protection of life, human health, public morals, and the environment.

In the context of this report, we should emphasize here that an entrepreneur must make or receive all payments related to economic activity in excess of the equivalent of € 15,000 via a bank account if another entrepreneur is party to the transaction.<sup>52</sup> The obligation of cashless transactions enables law enforcement authorities to acquire information on ‘suspicious transactions’ from a bank.<sup>53</sup>

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51 Zdyb 2013.

52 The conversion to PLN is based on the average foreign currency exchange rate set by the National Bank of Poland as of the last day of the month preceding the month during which the transaction is concluded (Article 22 of the FEA Act).

53 Article 105 Act of 29 August 1999 – The Banking Law (Official Journal of 2012, item 1376 – consolidated version; Judgment of the Katowice Court of Appeal of 21 May 2009, I ACa 259/09. The issue of suspicious transactions will be discussed in the last section of this report.

The FEA Act distinguishes between three types of economic activities: licensed activities, regulated activities and activities requiring a permit.<sup>54</sup> Next, we describe the procedure, the general requirements of the FEA Act and special requirements stemming from various legal acts that regulate selected economic activities.

### 9.3.2.1 Activities requiring a concession (licensed activities)

In the past, state monopolies covered branches of economic activity that required a special concession, as these were vital to generating revenues for the state budget and covering areas of fundamental importance to the national economy. Although the monopolies have been abolished, a strict regulatory regime applies to these economic sectors, for example because of the risk of criminal infiltration. Complicated regulations govern the granting of concessions and the activities of licensed operators. Moreover, in some areas the number of available concessions is limited.<sup>55</sup> The following economic activities require a concession:

1. Prospecting for or detecting deposits of mineral resources, extraction of minerals from deposits, non-tank storage of substances and waste storage in a rock mass, including underground mining excavations.
2. Manufacturing and trading in explosives, weapons, ammunition and products and technology for military or police usage.
3. Manufacturing, processing, storing, transmitting, distributing and trading in fuels and energy.
4. Protecting persons and property.
5. Broadcasting radio and television programmes (except if the programmes are distributed only on the Internet).
6. Air transport services.
7. Operating a casino.

Other business activities than those listed above do not require a concession.<sup>56</sup> Unless otherwise provided for in specific legislation, the competent minister or another competent central authority takes all administrative decisions concerning the concession. This includes granting, refusing, altering and revoking the concession and limiting its scope.<sup>57</sup>

Before issuing a decision on a concession, the competent authority verifies the information provided by the applicant in order to determine whether the entrepreneur complies with the conditions for conducting the economic activity and can guarantee that the

54 It should be noted that the FEA Act uses different names for economic activity requiring the permit. Some activities belonging to this group are also called 'licensed activities' (or 'activities requiring a licence'). In this report, the notion of 'licensed economic activity' is used only for activities requiring a special permit, called 'the concession'.

55 Zdyb 2013, commentary to Article 46, item 1 and 26.

56 Article 46 of the FEA Act.

57 Article 47 of the FEA Act.

activity covered by the concession will be performed properly.<sup>58</sup> In addition, if granting the concession poses a threat to the defence and security of the state or its citizens, the competent authority may refuse to grant it.<sup>59</sup> The concession may be withdrawn or reduced in scope for the same reasons. The competent authority is obliged to monitor such threats regularly by checking the databases described in Section 9.1. The competent authority is not obliged but entitled to withdraw the concession if irregularities occur.<sup>60</sup> The prerequisites for withdrawing a concession are described in more detail in the following section.

Separate statutes regulate the aforementioned seven branches of economic activity. We describe four of these in the following section: the manufacture of and trafficking in weapons and ammunition, the production and distribution of fuels and energy, the protection of persons and property, and the operating of a casino.

#### 9.3.2.1.1 *Manufacture of and trafficking in explosives, weapons and ammunition*

The Act of 22 June 2001 on economic activity in the production of and trafficking in explosive materials, weapons, ammunition and technology for military or police (further referred to as the EWA Act) regulates this particular activity.<sup>61</sup> The Minister of Internal Affairs is the competent authority.

Obviously, strict regulation and monitoring of this economic activity is necessary to prevent the illegal manufacture of and trafficking in weapons and ammunition. In this case, the competent authority must consult the Minister of Economic Affairs, the Head of the Internal Security Agency, the Chief of the Military Counterintelligence Service and the appropriate Voivodship Commander of the Police in order to obtain a positive opinion on the entity applying for the concession and about the proposed conditions for conducting the licensed activity.<sup>62</sup> These authorities, as well the Main Labour Inspector, must also be informed of every concession granted.<sup>63</sup> In accordance with Article 8 of the EWA Act, an entrepreneur applying for a concession must, *inter alia*, prove his good conduct as follows:

1. he/she has a clean record with respect to final judgments for an intentional criminal or fiscal offence;
2. he/she is not suspected of having committed an intentional criminal or fiscal offence in pending criminal proceedings;
3. he/she is not registered as an insolvent debtor (the Registry of insolvent debtors is part of the National Court Register, described in Section 9.4.1).

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<sup>58</sup> Article 50 of the FEA Act,

<sup>59</sup> Article 56 (1) point 2 of the FEA Act.

<sup>60</sup> This is criticized in the literature: Nałęcz 2010, p. 149-154.

<sup>61</sup> Official Journal of 2012, item 1017 – consolidated version.

<sup>62</sup> Article 7 (2) of the EWA Act.

<sup>63</sup> Article 7 (3) of the EWA Act.

Persons who have been granted the concession and all employees who work directly in the manufacture of or trafficking in arms, ammunition or explosives are required to submit a current medical and psychological certificate to the granting authority every five years indicating the absence of contraindications to exercise or manage the economic activities foreseen in the concession.<sup>64</sup> The application must be underpinned by documents certifying that the applicant meets with the above-mentioned conditions. The competent authority has the right to demand additional information from the applicant to verify the application, and can also check the circumstances indicated in the application.<sup>65</sup>

#### 9.3.2.1.2 *Manufacturing, processing, storing, transmitting, distributing and trading in fuels and energy*

The Act of 10 April 1997 – The Energy Law regulates the manufacturing, processing, storing, transmitting, distributing and trading in fuels and energy.<sup>66</sup> The competent authority is the president of the Energy Regulatory Office, who is appointed by the Prime Minister.

The decision to subject these areas of business to strict regulation was motivated by problems with the ‘fuel mafia’, which traded in fuels from illegal sources, both imported from countries behind the eastern Polish border and domestically produced. This caused the state as well as the European Union huge financial losses and threatened the safety of citizens.<sup>67</sup>

The biggest fuel affair came to light in 2002. Members of organized criminal groups used ‘straw men’, such as poor people, drug addicts and alcoholics, who would register a business or a company under their name for a small fee. These straw men transferred money and issued invoices designed to confirm alleged purchases and sales of fuel. The documents passed through a chain of such companies, resulting in the ‘laundering’ of illegal fuel on paper. In reality, excises were not paid and the products went straight from the illegal importer to petrol stations. Second, a number of companies cooperating with Polish refineries undertook another *modus operandi*. They delivered substances that had been mixed with other components to petrol stations as sterling diesel fuel. These products were laundered similarly as ‘imported’ fuel. Corrupt police officers and tax officials were involved in these criminal activities. Third, illegal petrol was also produced from heating oil and distributed at petrol stations as diesel fuel, since the excise imposed on oil used in heating systems is much lower. This fuel was of poor quality and could have caused dan-

64 Article 11 (1) of the EWA Act.

65 Article 12 (4) of the EWA Act.

66 Official Journal of 2012, item 1059 – consolidated version.

67 Muras & Swora 2013, item 18.

gerous vehicle breakdowns.<sup>68</sup> The fuel affair was successfully investigated: 19 bills of indictment were submitted to various courts, 330 persons were accused and 50 persons were detained on remand. In total, 1263 companies were involved in this affair. A single investigation conducted by the prosecutor's office in Krakow established that the State Treasury had lost in excess of PLN 1 billion. In total, the whole affair caused losses in excess of PLN 10 billion.<sup>69</sup>

Article 32 of the Act regulates the scope of activities subject to licensing. A concession is required (with some detailed exceptions) for the production of fuel and energy, the storage of fuel, the transmission or distribution of energy or fuels, and the trade in fuels or energy. Without a concession, for example, it is not possible to operate a legal petrol station. In accordance with Article 33 of the Energy Law, the concession may be granted to an entrepreneur who has sufficient financial resources and can prove that he has access to them, who has the technical abilities to run the activities correctly, and who undertakes to employ only people with relevant professional qualifications.

The concession cannot be granted to a person who has been convicted in a final judgment of a criminal offence concerning an economic activity in the area covered by the requested concession.<sup>70</sup> The application must include information on the applicant's current activities as well as financial statements regarding the last three years.<sup>71</sup> Article 56 of the Energy Law allows the President of the Energy Regulatory Office to impose fines (by way of an administrative sanction) on entrepreneurs who *inter alia* failed to submit the required certificates of origin of fuel or components or other required information or documents, who did not respect the duties stemming from the concession, who did not submit the financial statements within the prescribed time limits, who reported false data in the financial statements, or who hindered the carrying out of inspections.

#### 9.3.2.1.3 *Protection of persons and property*

The Act of 22 August 1997 on protection of persons and property regulates the business of protecting persons and property.<sup>72</sup> This is an example of the privatization of public tasks.<sup>73</sup> In principle, a company operating in this field may offer services provided by employees involved in physical and technical protection. The services may cover, *inter*

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68 See information provided by the police at <http://www.policja.pl/pol/aktualnosci/80657,quotFabrykaquot-nielegalnego-paliwa-zlikwidowana.html>.

69 See information available at <http://archiwum.rp.pl/artykul/395216-Miliardy-utopione-w-benzynie.html>.

70 Article 33 (3) point 3 of the Energy Law.

71 Article 35 (1) point 3 of the Energy Law.

72 Official Journal of 2005, no. 145, item 1221, with amendments.

73 Zdyb 2013, commentary to Article 46, item 63.



*alia*, protection of objects, areas,<sup>74</sup> buildings and persons. The Minister of Internal Affairs is the competent authority for granting concessions.

The screening procedure for applicants is complex and dual in nature. First, the natural person must have a professional licence and be included in the special lists of persons qualified to offer either physical or technical protection as administrated by the Head of the National Police. Second, if the applicant is a collective entity, the natural person indicated above must be a member of this entity.<sup>75</sup> Furthermore, all other persons representing this entity must be of good conduct. This means that the candidate must have a clean criminal record and that no criminal proceedings concerning an intentional criminal offence are being conducted against him/her. In addition, he or she must have an impeccable reputation, accounted for in writing by the competent Commander of the Police.<sup>76</sup>

The competent police department will remove the person from the above lists if he/she no longer meets these requirements. Moreover, even a conviction for certain petty offences such as driving a vehicle under the influence of alcohol or being intoxicated in the workplace suffices to remove a licence holder from the lists of persons qualified to offer physical or technical protection.<sup>77</sup> The concession is granted after consultation with the competent Voivodship Police Commander.<sup>78</sup>

If a collective entity applies for a concession, all persons entitled to represent the applicant must be free of convictions in a final judgment concerning an intentional criminal or fiscal offence.

The entrepreneur holding the concession is obliged to verify, at regular intervals, that his or her employees have not been convicted for the offences mentioned above. This requirement also concerns the managerial staff. As mentioned in Section 9.1.3, employers may request information from the NCR if the law so provides. They may also ask employees to submit such information on a regular basis. The concession authority must be notified immediately of convictions.<sup>79</sup> Obviously, the police may also access information from the NCR and NCCI for monitoring purposes.

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74 Article 5 (2) of the Act provides for an open catalogue of areas, buildings or other structures that must be protected. These are, for example: 1) areas related to the defence of the state, such as plants producing weapons and military equipment; 2) areas related to the economic interests of the state, for example: a) plants having a direct connection with the extraction of minerals of strategic importance to the state, b) ports and airports, c) banks and companies producing, storing or transporting cash in significant amounts; 3) areas related to public safety, in particular: a) facilities and installations which are essential for the functioning of urban areas, whose destruction or damage may pose a threat to human life and health and to the environment.

75 In other words, he or she must be a partner in a general partnership or limited partnership, or a member of the management body or proxy established by the entrepreneur to direct the activities specified in the concession, or must be a person authorized to represent the entrepreneur.

76 Article 26 (3) point 5 and 6 and Article 27 (2) point 2 of the Act.

77 Article 29 (6) and (7) of the Act.

78 Article 16 of the Act.

79 Article 19 of the Act.

#### 9.3.2.1.4 *Operating a casino*

The Act of 30 November 2009 on Gambling Law regulates casino operations.<sup>80</sup> The Minister of Public Finances is the competent authority for concessions, and the Director of the Customs Chamber for permits. Gambling is subject to exceptionally detailed regulations owing to the risk of criminal activities, particularly money laundering. Article 5 of the Gambling Law allows monopolies only for numbers games, cash lotteries and 'telebingo'. The FEA Act does not apply to the procedure to grant, refuse, alter or cancel an operating concession for a casino.<sup>81</sup>

The Act sets forth the terms and conditions for the operators as well as the principles for running games of chance, betting and electronic gambling machines.<sup>82</sup> The casino operating concessions only allow for roulette card games, dice games and electronic gambling machines. Only a joint-stock company or a limited liability company with its registered office within the territory of Poland is eligible for a concession. Other gambling activities require specific permits.

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80 Official Journal of 2009, no. 201, item 1540.

81 Article 32 (6) of the Gambling Law. Article 4 of the Gambling Law states that references in the Act to 'casino' should be taken to mean a separate place where cylindrical games, card games, dice games or gaming machines are organized in accordance with the approved game regulations. In the casino the total number of cylindrical games and card games must not be less than four and the number of gaming machines installed must not be less than five or more than 70.

82 In accordance to Article 2 (1) of the Gambling Law:

1. games of chance are defined as games where the prize is either cash or a material prize and where the outcome is notably random, while the terms and conditions are stipulated by the game regulations; this refers to a) numbers games, b) cash lotteries, c) telebingo, d) roulette e) card games: black jack, poker and baccarat, f) dice games, g) cash bingo, h) raffle bingo, i) raffle lotteries, j) promotion lotteries, k) audiototele lotteries.
2. betting is defined as betting for cash or material prizes determined by luck a) the results of a sports competition in which competitors are people or animals and where the participants pay stakes, while the prize depends on the total stakes paid – 'totalisator systems'; or b) the occurrence of different events where the participants pay stakes and where the actual prize depends on the stake-to-winings ratio agreed between the bookmaker and the stake payer – 'bookmaking services';
3. games on electronic gambling machines are defined as games of chance that are played using mechanical, electromechanical or electronic devices, computer hardware included, where the prizes are either cash or material prizes. A material prize is also a prize whereby the player can continue the game without needing to pay the stake or start a new game using the prize won in the previous one. Games on machines are also games of chance that are played using mechanical, electromechanical or electronic devices, computer hardware included, organized for commercial purposes, in which players cannot win cash or material prizes.

It should be noted that in accordance with Article 16 of the Gambling Law, the entire profit from the raffle lottery and raffle bingo is used for community services purposes, and notably for charity, as set forth in the permit and the game regulations. The entity organizing a raffle lottery or raffle bingo must present the authority granting the permit with a detailed report showing that such obligation was fulfilled within 30 days of the last day that the game was organized.

### **General requirements for operating a casino and gambling venues**

The Gambling Law lists general requirements for entities that wish to operate an economic activity in scope of the Act (Article 11 and 12) and general rules for the operation of gambling venues (see below). Furthermore, the Gambling Law lists detailed requirements for obtaining a concession or a permit and the supervisory instruments.

Article 11 of the Gambling Law requires the absence of justified reservations with regard to natural persons, legal entities or non-legal entities relating to the security of the state, public order, or the state's economic interests. This requirement also applies for shareholders whose share exceeds 1% of the company's initial capital, and members of the management and supervisory boards as well as the audit committee. Furthermore, the aforementioned natural persons are excluded if they are a suspect in pending proceedings concerning a money-laundering offence as defined in Article 299 of the Criminal Code.

Natural persons who are shareholders and possess at least 1% of the initial capital, as well as members of the management and supervisory boards and the audit committee of the company, are required to have an impeccable reputation and no record of intentional criminal or fiscal offences. At the request of the authority granting the concession or permit, these persons must present a valid certificate stating that they have not been convicted of any intentional criminal or fiscal offences.<sup>83</sup>

The gambling venues are obliged to establish the identity of their customers, register this information, and hand it over on request to customs officers, inspectors and police officers conducting inspections, as well as to the court and the prosecutor in pending criminal proceedings. Information in the guest registry is kept for a period of three years from the end of the calendar year in which it was entered.<sup>84</sup>

In addition to the above requirements, persons supervising or operating gambling activities must have a special professional licence.<sup>85</sup> The Minister of Public Finance issues these licences to persons who meet all of the following requirements:

1. an impeccable reputation;
2. sufficient command of the Polish language to hold the function or position that they are applying for;
3. absence of convictions for an intentional criminal or fiscal offence.

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<sup>83</sup> Article 12 of the Gambling Law.

<sup>84</sup> Article 15a of the Gambling Law. Registration of guests is important for law enforcement authorities who are supervising the execution of a penal measure imposing a ban on entering gaming centres or participating in games of chance (Article 39 2d of the Criminal Code). Such penal measures may be imposed in a final judgment by the criminal court.

<sup>85</sup> Article 24 of the Gambling Law.

Based on Article 26 of the Gambling Law, the Minister of Public Finance may cancel – by way of a decision – the professional licence or recognition of the licence if the person no longer meets these requirements.

Another general rule is that the entity that runs the gambling activity is not allowed to entrust another entity with the activities related to the organization of such games, with some exceptions.<sup>86</sup> However, a company that offers numbers games, cash lotteries or betting can entrust another entity with certain tasks under the agency contract. The entrusted entity then:

1. must have an impeccable reputation (including absence of convictions for an intentional criminal or fiscal offence);
2. must not be in arrears for the payment of income tax or customs duties, social security contributions or health insurance contributions;
3. must not pose a threat to the security of the state, public order or the safety of the state's economic interests;
4. must be able to prove that its initial capital, funding or other assets earmarked for performing the entrusted activities do not originate from illegal or undisclosed sources.

### **Concession/permit – 'lawful capital'**

The concession or permit can be granted only to entities that provide a document showing that their capital originates from legal sources, and that are not in arrears for the payment of income taxes, customs duties, social security contributions, or health insurance contributions. The competent head of the tax office issues the certificate of lawful capital.<sup>87</sup> This certificate, as well as the declaration stating the absence of a criminal record, is attached to the application. Article 35ff list detailed requirements for the application as well as the documents the applicant must provide. Furthermore, pursuant to Article 78 of the Gambling Law, operators must comply with other requirements, such as:

1. administration of the a) sale of chips/tokens and cash at the casino, b) sale of cards for the game at the cash bingo hall, c) operation of gambling machines;
2. keeping records for the game tax base and computation, in a predefined form, with the exception of promotion lotteries;
3. keeping a register of tips at the casino, in a predefined form;
4. archiving all documents that enable the settlement of the financial result – for raffle lotteries or raffle bingo.

At the request of the Minister of Public Finance or the Directors of the Customs Chambers competent to grant the permit, the entities organizing or running a gambling activity are

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<sup>86</sup> Article 28 of the Gambling Law.

<sup>87</sup> Article 34 of the Gambling Law.

obliged to provide information on their operations. This includes economic and financial data on their current operations and, in particular, on turnover, financial results, economic ratios, the headcount ratio, and their statistical ratios. Pursuant to Articles 89-91 of the Gambling Law, the head of the customs office within whose jurisdiction the gambling activities are organized may impose administrative penalties (fines) for the following acts:

1. organizing games without a concession or permit;
2. organizing games on electronic gambling machines outside the casino;
3. participating in a game organized without a concession or permit.

Pursuant to Article 89 paragraph 2 of the Gambling Law, the following fines can be imposed:

- a. 100% of the gambling revenues if the games are offered without a concession or permit;
- b. PLN 12,000 for every electronic gambling machine – if organizing games on such machines outside the casino;
- c. 100% of the prize won – if participating in a game organized without a concession or permit.

The Head of the Customs Office within whose jurisdiction gaming is organized imposes the fines in a decision. The fine is payable within seven days following the day of the decision becoming final.<sup>88</sup> The authority granting a concession may cease the activities of a gambling operator by withdrawing the concession (see Section 9.4.3.2 below).

Article 20 of the Gambling Law provides another instrument of control. It obliges the gambling operator to issue a personal certificate for a prize at the customer's request. The certificate is to be issued on a special form either on the day after the prize has been won or at the latest on the day after the prize is paid out. The entity organizing the games must keep records and copies of the certificates for five years following the calendar year in which the prize was won or paid out. The gambling operator must make the records of these certificates available to the Head of the Customs Office for validation. The entity must purchase the certificate forms, by filing a relevant motion in writing, from the competent Head of the Customs Office. The gambling operator must also keep records of prizes above PLN 20,000 that have been paid out or distributed.

### **9.3.2.2 Regulated activity**

If a provision of a separate act determines that an activity is a regulated within the context of the FEA Act, the entrepreneur may only conduct this activity if he meets with the specific conditions laid down in the said provisions of this separate act, and registers in the Regulated Activity Register – hereafter referred to as RAR.<sup>89</sup> The FEA Act itself does not list

<sup>88</sup> Article 90 of the Gambling Law.

<sup>89</sup> Article 64 the FEA Act.

regulated activities. At present, Polish legislation has 20 types of regulated activities and each has its own, specific conditions for entrepreneurs.<sup>90</sup>

The RAR is an open register kept by the competent authority. If this authority submits a statement that an entrepreneur satisfies the conditions set for a specific activity in the relevant regulatory legislation, the authority enters this information in the RAR. The aim of the RAR is to simplify the procedure for starting a business in areas of economic activity which in the opinion of the legislator require additional albeit not special regulations because of their nature and importance to the national economy and public safety.<sup>91</sup> Nevertheless, embarking on a regulated activity under these conditions and registering in the RAR only require the candidate to file a statement on an official form. The registration authority may request a certificate concerning the applicant from the National Crime Register, but other information provided by the applicant is not automatically verified. However, the competent authority may check *ex post* whether the statement submitted by the entrepreneur is accurate.<sup>92</sup>

The next sections offer some examples of regulated businesses that may be at risk of being misused for criminal purposes. Section 9.4 then addresses the procedures for refusing entry into and for removal from the RAR.

### **Operating a driver training centre**

With regard to operating a driver training centre, the county governor (or, for a city with county rights, the city president) is the competent authority for registration. The legal basis for this is the Act of 5 January 2011 on vehicle drivers.<sup>93</sup> Screening and monitoring of this branch of economic activity are important in order to ensure road safety (by appropriate training of future drivers) and because of the risk of corruption associated with the examination of drivers before a driving licence is granted. The latter has been a substantial problem in the past few years. In November 2013 alone, the web pages of the police and the Central Anti-Corruption Bureau reported that corruption had been uncovered at two driver training centres in Tarnów and Lublin. These cases led to the arrest of several dozens of persons.

In accordance with Article 28 (2) of the Act, entrepreneurs who apply for registration must be able to prove their professional skills and good conduct. They must:

1. have an infrastructure adequate for the scope of the prospective education and training;
2. employ at least one instructor who has an appropriate education and three years of documented experience teaching driving skills. Natural persons must satisfy this requirement;

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90 Sieradzka 2013, commentary to Article 64, item 11.

91 Sieradzka 2013, commentary to Article 64, item 2.

92 Sieradzka 2013, commentary to Article 71, item 1.

93 Official Journal of 2011, no. 30, item 151, with amendments.

3. not have a final conviction for an offence related to financial profits or document fraud. This applies to natural persons and to members of the legal person's management. The application for registration must include, *inter alia*, a statement that the information provided is complete and true.

Not only entrepreneurs applying for registration but also the instructors must be of good conduct. This means the absence of any conviction in a final judgement for the following criminal offences:<sup>94</sup>

1. a crime in the context of road safety,
2. a crime involving financial gain or personal profits (for example: corruption),
3. document fraud,
4. driving under the influence,
5. an intentional crime against life and health,
6. a crime against sexual freedom and decency.

The county governor cooperates with the police (to monitor the practical driving lessons conducted outside the driver training centre) and the Regional Traffic Centres<sup>95</sup> on supervising the activity.<sup>96</sup> Article 44 (1) of the Act states that the registration authority shall inspect the driver training centre at least once a year or if there are indications of fraud. Such indications may follow from statistical analysis of the number of persons who passed the exam for a driving licence and traffic violations committed by these persons over a two-year period after they obtained their driving licence. Inspections can also be initiated if complaints are submitted to the supervisory authorities. The person empowered by the registration authority performs the inspections of the driver training centre. Such a person has the right:

- to demand written or oral explanations, access to documents and access to all information related to the subject of control;
- enter the driver training centre and the premises where theory lessons are given (but only on working days and during working hours), as well the vehicles used for practical training;
- observe the lessons.<sup>97</sup>

<sup>94</sup> Article 33 (1) of the Act.

<sup>95</sup> Centres that conduct state driving examinations. These centres provide technical assistance and register information on the exam results of those who completed training in the centre.

<sup>96</sup> Article 43 of the Act.

<sup>97</sup> Article 44 (5) of the Act.

### **Production, storage or marketing of bio-components and liquid bio-fuels**

The President of the Agricultural Market Agency (appointed by the Prime Minister), acting under the Act of 25 August 2006 on bio-components and liquid bio-fuels, is the competent authority for registering activities in this area.<sup>98</sup> The main reason for regulating this economic activity is the need to protect the interests of the Treasury and the environment. In accordance with Article 5 (1) and (2) of the Act, such activities require a declaration of good conduct. This encompasses the absence of convictions for fiscal offences and property crimes, document fraud, and offences against business transactions, money and securities.

Article 13 of the Act states that farmers can produce bio-fuels for their own use after being entered into a separate register administrated by the President of the Agricultural Market Agency. However, they are not allowed to sell or dispose of the bio-fuels or to exceed the limits of production for their own use. They are also obliged to submit annual reports.<sup>99</sup> The registration authority is entitled to perform inspections. Persons empowered to carry out these inspections are entitled to enter the operators' facilities and premises and demand oral or written explanations, documentation or other information related to the inspection.

The registered entrepreneur is obliged to report to the registration authority and to the President of the Energy Regulatory Office every three months on his or her activities, such as the amount and type of manufactured and marketed liquid fuels, income earned and costs incurred.<sup>100</sup>

The registration authority may impose an administrative penalty (a fine) on entrepreneurs who, *inter alia*, undertake the activity without registration, hamper inspections, fail to submit the above-mentioned reports or provide untrue information in these reports.<sup>101</sup>

### **Production of spirituous beverages/production of ethyl alcohol/manufacture of tobacco products/production and bottling of wine**

The Minister of Agriculture is the competent authority for registering the production of spirituous beverages, ethyl alcohol, tobacco products and the bottling of wine. This competence is based on the Act of 2 March 2001<sup>102</sup> on the production of ethyl alcohol and the manufacture of tobacco products (hereafter Act on ethyl alcohol and tobacco), the Act of 18 October 2006 on the production of spirituous beverages and on the registration and protection of geographical indications of spirituous beverages<sup>103</sup> (hereafter Act on spirituous

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98 Official Journal of 2013, item 1134 – consolidated version.

99 Article 14(4) point 3 of the Act.

100 Article 30ff of the Act.

101 Article 33 of the Act.

102 Official Journal of 2001, no. 31, item 353 with amendments.

103 Official Journal of 2013, item 144 – consolidated version.



beverages) and the Act of 12 May 2011 on the production and bottling of wine and trading in these products and the organization of the wine market (hereafter Act on wine).<sup>104</sup>

The main purpose of these regulations is to protect the health of citizens and to prevent the marketing of products originating from illegal sources.

In accordance with Article 3 (3) of the Act on ethyl alcohol and tobacco, entrepreneurs who produce, purify, denature or dehydrate ethyl alcohol or manufacture tobacco products are obliged to implement a system of internal control. This system must specify the frequency and method of sampling for qualitative tests, the testing methods, and how to deal with products that do not meet the quality requirements. He or she must also designate a person responsible for quality control. The buildings and technical equipment used must meet requirements specified in separate regulations on fire protection, sanitation and environmental protection in particular.<sup>105</sup>

Article 5 (2) under 6, (3) and (4) of the Act on ethyl alcohol and tobacco lists the technical specifications for operators as well as the requirement of good conduct. The entrepreneur applying for registration must make clear in his statement that:

- he or she has no debts to the State Treasury, the Social Insurance Institution or the Agricultural Social Insurance Fund;
- he or she has not been convicted of property crimes and document fraud (if the entrepreneur is a legal person, this requirement concerns the members of its management);
- he or she has obtained a certificate from the district commander of the State Fire Department, the district sanitary inspector and the provincial environmental protection inspector stating that the buildings and technical equipment for the intended economic activities meet the requirements specified in fire protection, sanitation and environmental protection regulations;
- the information provided in the registration application is complete and true.

The Acts on spirituous beverages (Article 6) and wine (Article 20) have similar requirements. However, the provisions in these Acts do not apply to home-made spirituous beverages and wines intended only for personal use.

### **Operating a currency exchange office**

Based on the Act of 27 July 2002 on Foreign Currency Exchanges, the President of the Polish National Bank (appointed by Parliament) is the competent authority for registering

<sup>104</sup> Official Journal of 2011, no. 120, item 690 with amendments.

<sup>105</sup> Article 3 (4) of the Act on ethyl alcohol and tobacco.

currency exchange offices.<sup>106</sup> The main aim of this regulation is to prevent money laundering.

A currency exchange office can be operated by a natural person who has not been finally sentenced for a fiscal offence or for an offence committed for gaining financial or personal profits, as well as by a legal person whose members of management or shareholders have not been convicted for the same offences (Article 12 of the Act).<sup>107</sup> Furthermore, persons must be adequately trained to work in a foreign currency exchange office.<sup>108</sup> In accordance with Article 14 (1) and (2) of the Act, the operator is obliged to keep records of all transactions. Furthermore, the operator must annually obtain an updated document from the National Crime Register confirming the absence of a criminal record regarding the above-mentioned crimes.

Employees of the Polish National Bank are responsible for checking the operator's activities. The entrepreneur is obliged to ensure that they can perform the checks without difficulty by allowing access to all relevant documents, providing explanations, and making compilations or calculations on request.<sup>109</sup> The persons who carry out the inspections must be able to access the facilities and premises of the entity in the presence of one of its representatives and to move freely within the premises without requiring a permit.<sup>110</sup> The inspectors can deliver post-inspection recommendations to the President of the Polish National Bank.

### **Operating a nursery or kindergarten**

Based on the Act of 4 February 2011 on care of children up to three years, the mayor/city president is the competent authority for registering the operation of a nursery or kindergarten.<sup>111</sup> Both public (municipalities) and private actors may engage in this economic activity (this is another example of the 'privatization' of public tasks).

In accordance with Article 18 of the Act, the director of the nursery, as well as all persons working with children in the nursery or kindergarten (e.g. caregivers, nurses, midwives, and volunteers) must be of good conduct.<sup>112</sup> They must guarantee due care for the children and must not have been deprived of parental authority or suspended from or restricted in their parental rights. Furthermore, they must satisfy the maintenance obligation if this has been imposed on them following a court judgment. Another requirement is the absence

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<sup>106</sup> Official Journal of 2012, item 826 – consolidated version with amendments.

<sup>107</sup> Article 12 of the Act.

<sup>108</sup> Article 13 of the Act.

<sup>109</sup> Article 35 (1) and (2) of the Act.

<sup>110</sup> Article 35 (3) of the Act.

<sup>111</sup> Official Journal of 2013, item 1457 – consolidated version.

<sup>112</sup> Regulations concerning teachers discussed in the second section apply only to persons taking care of older children.

of convictions for intentional crimes and of bans on conducting economic activities covered by the registration.<sup>113</sup>

Article 25 of the Act states that a nursery or kindergarten can be operated in premises that meet the requirements set by the minister responsible for family affairs. The commander of the district (municipal) State Fire Service and the competent sanitary inspector must issue a positive opinion as to whether this is the case. In accordance with Articles 54 and 56 of the Act the registration authority competent to exercise supervision of nurseries and kindergartens may appoint inspectors. They are entitled to enter the buildings, facilities, premises or parts thereof on the days and at times when the activity is being or should be conducted; demand oral or written explanations, documents or other information; access information relevant to the subject of monitoring activities; and access all documents concerning the personnel of the monitored nurseries or kindergartens.

If the entity operating the nursery or kindergarten does not meet the required standards of care, it must correct the irregularities within a prescribed period. The entity is entitled to submit written objections to post-inspection findings within seven days of the date of receiving information on irregularities. If the irregularities are not corrected before the deadline, the registration authority removes the entity from the registry.<sup>114</sup>

### 9.3.2.3 Activities requiring a permit

A permit allows entrepreneurs to conduct an economic activity if they satisfy the conditions set in specific legal acts. The basic difference between a permit and a concession is that a granting authority cannot refuse a permit if the applicant satisfies the conditions provided for by law, whereas concessions are granted on a discretionary basis.

Currently, 28 economic activities require a permit.<sup>115</sup> These areas of business are considered especially important to the public interest and to the protection of constitutionally guaranteed rights and freedoms. A separate legal act regulates each specific activity and sets the requirements for obtaining a permit. The granting authority has to verify these requirements before issuing an administrative decision granting or refusing a permit. Granted permits are not recorded in any register. The entrepreneur receives a certificate, which he or she must show in the event of an inspection.<sup>116</sup> Below we describe selected economic activities that are particularly susceptible to criminal exploitation.

<sup>113</sup> Article 31 point 2 of the Act, *a contrario*.

<sup>114</sup> Article 57 of the Act.

<sup>115</sup> The list included in Article 75 of the FEA Act is open and subject to change.

<sup>116</sup> Zdyb 2013, commentary to Article 75, item 2, 10 and 11.

### Activities related to the distribution of alcohol

The Act of 26 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism (hereafter referred to as USCA) regulates the distribution of alcohol.<sup>117</sup> Various public organs are competent to grant a permit, depending on the type of distribution. The Minister of Economic Affairs is the competent authority for the *wholesale trade* in products containing 18% or higher levels of alcohol. The Marshal of the Voivodship grants permits for the wholesale trade in products containing less than 18% alcohol. The local mayor/president of the city is entitled to grant permits for the *retail trade* in shops, bars or clubs.<sup>118</sup>

Obviously, all the administrative rules governing the distribution of alcohol were introduced with the aim of reducing the consumption of alcoholic beverages and in order to change the structure of their consumption by limiting access to alcohol.<sup>119</sup> Article 9<sup>4</sup> of the USCA set numerous requirements for granting and renewing permits for the wholesale trade in alcohol products. The most important obligations are to report the volume of alcoholic beverages sold every year; to sell alcoholic beverages specified in the permit only to entrepreneurs holding permits for the wholesale or retail sale of such beverages; to sell only alcoholic beverages bearing a mandatory official stamp unless this is not required by law; to obtain alcoholic beverages specified in the permit from producers and entrepreneurs holding permits for wholesaling such beverages; the absence of any arrears in the payment of taxes and social insurance.

With reference to the retail trade in alcohol products, there are three types of permits. Each is granted by the mayor/city president having jurisdiction over the prospective point of distribution. These permits concern beverages with an alcohol content of up to 4.5% and beer; beverages with an alcohol content of 4.5% to 18% (except beer); and beverages with more than 18% alcohol content.<sup>120</sup>

Any application for a retail permit for alcohol must meet the requirements set in Commune Council resolutions. Article 12 (1) of the USCA states that the Council of the commune determines, by way of resolution, the number of operators that may sell alcoholic beverages with an alcohol content in excess of 4.5% (except for beer) in the territory of the given commune (city). The Commune Council establishes, by way of resolution, the locations within its jurisdiction where alcohol can be sold. The Council may for instance forbid the sale of alcohol near schools and churches.

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117 Official Journal of 2012, item 1356 – consolidated version.

118 It should be pointed out that the Polish legal system does not include a separate regulation for running a bar or club. In the Act on Upbringing in Sobriety and Counteracting Alcoholism, the provisions concerning permits for the retail trade in alcohol also apply to all activities connected with selling alcohol to private customers. Revocation of such a permit usually leads to the closing of a bar or club. Thus, the provisions of the Act offer instruments to combat crimes connected with this economic activity.

119 Preamble of the Act and Article 1.

120 Article 18 (3) of the USCA.

An administrative decision on granting a permit for the distribution of beverages with more than 18% alcohol content can be issued after the Communal Commission for Resolving Alcohol-Related Problems issues a positive opinion on the applicant's compliance with the communal resolutions.<sup>121</sup> Article 18 (7) of the USCA indicates several conditions for the lawful distribution of alcoholic beverages. In general, the alcohol offered for sale (served in bars and clubs) must originate from legal sources and must be distributed in accordance with the rules indicated in the permit.

As the granting authorities, the municipal police or members of the Communal Commission for Resolving Alcohol-Related Problems are entitled to monitor compliance with regulations and conditions of the permit.<sup>122</sup> They must conduct their inspections in accordance with the general provisions of the FEA Act.

The USCA does not require the absence of a criminal record. Consequently, natural persons or legal entities applying for a permit are screened only upon their registration as entrepreneurs. However, a permit for the wholesale trade will be withdrawn if the operator of the business has committed an offence for financial gain, and if he or she, or the legal person, has been banned from operating the business activity covered by the permit.<sup>123</sup> The same applies to a permit granted for the retail trade, including the distribution of beverages in bars or clubs.<sup>124</sup>

Article 19 of the USCA offers the Council of Ministers a special instrument. It allows the Council to adopt a resolution that imposes a full or partial ban on the distribution of alcoholic beverages for a fixed period, either in the entire country or in selected areas if this is deemed necessary for the protection of public safety and public order. In urgent cases, the Council of Ministers may introduce the ban without a resolution.

### **Activities related to producing, processing, converting and marketing medicines or psychotropic substances (medicinal and non-medicinal products)**

This section addresses the production, processing, converting and marketing of medicines or psychotropic substances (medicinal and non-medicinal products). The Act of 6 September 2001 on Pharmaceutical Law<sup>125</sup> and the Act of 29 July 2005 on Counteracting Drug Addiction<sup>126</sup> (hereafter referred to as the CDA) provide the legal basis for these activities.<sup>127</sup> The Main Pharmaceutical Inspector is the competent authority for granting a permit.

121 Article 18 (3a) of the USCA.

122 Article 18 (8) of the USCA.

123 Article 9<sup>5</sup> (1) of the USCA.

124 Article 18 (10) of the USCA.

125 Official Journal of 2008, no. 45, item 271, with amendments.

126 Official Journal of 2005, no. 7, item 29, with amendments.

127 Pursuant to Article 3 of the CDA, its provisions shall apply to:

According to Article 35 (1) of the CDA, only an entrepreneur who has obtained two separate permits from the Main Pharmaceutical Inspector can *produce, process or convert* narcotic drugs or psychotropic substances that *are medicinal products*. The first is a general permit for the production of medicinal products (manufacturing permit). After obtaining this permit, the operator can apply for the second permit, which identifies the specific drugs or substances that he may produce, process or convert.

If the entrepreneur wants to produce, process or convert narcotic drugs or psychotropic substances *that are not medicinal products* or the precursors of category 1,<sup>128</sup> he or she only needs the second permit.<sup>129</sup> Both permits may be granted only after the Voivodship Pharmaceutical Inspector has issued a statement that the entrepreneur applying for a permit can guarantee that the narcotic drugs or psychotropic substances will not be used by unauthorized persons or for purposes other than those specified in the permit. The permits specify the amount of narcotic products allowed and the purpose for which the permit has been granted.<sup>130</sup> The above requirements also apply to entrepreneurs involved in the import or export of narcotic drugs or psychotropic substances.

A permit from the Main Pharmaceutical Inspector is also required for the *wholesale trade* in narcotic drugs and psychotropic substances, whether or not they are medical products.<sup>131</sup> This permit may be granted on the conditions mentioned above (i.e. the statement required from the Voivodship Pharmaceutical Inspector). In addition, the trader in these products must keep records of narcotic drugs and psychotropic substances and must take measures to prevent theft, for instance.<sup>132</sup>

Pursuant to Article 38 of the CDA, all entrepreneurs operating a business involving drug precursors are required to provide the competent pharmaceutical inspectors with information about any suspicious transactions. The appropriate pharmaceutical inspectors record all information on such transactions in special databases.

In accordance with Article 41 of the CDA, pharmacies and pharmacy outlets are *retailers* in narcotic drugs and psychotropic substances for medical use. Pharmacy operators must ensure appropriate storage conditions and apply other measures to prevent unauthorized access to these goods. The Pharmaceutical Law lists the conditions for operating

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1. medical products which are narcotic drugs, psychotropic substances or precursors, within the scope not regulated by the provisions of the Pharmaceutical Law;

2. chemical substances and mixtures of chemical substances which are 'precursors'.

128 Substances that can be used for the production of narcotic drugs or psychotropic substances referred to in Article 2 point a) of Regulation 273/2004 of the European Parliament and the Council of 11 February 2004, specified in the Annex 1 to this Regulation.

129 Article 35 item 2 of the CDA.

130 Article 35 item 8 of the CDA.

131 Article 40 (1) and (2) of the CDA.

132 Article 40 (4) of the CDA.

pharmacies and contains detailed requirements for obtaining the above-mentioned permits.<sup>133</sup>

The CDA also encompasses detailed regulations for obtaining a special permit for the cultivation of poppy and fibrous hemp.<sup>134</sup> The commune mayor with jurisdiction over the crop location is the competent authority for granting a permit. Applicants must be free of convictions for criminal offences or petty offences related to narcotic substances, such as the cultivation of poppy without a permit and the theft of narcotic and psychotropic substances. As transpires from Article 45 of the CDA, the cultivation of poppy is only permitted to meet the needs of the pharmaceutical industry and for seed production. An exception is made for low-morphine poppy, which may be cultivated exclusively for food and seed production purposes. Cultivation of fibrous hemp is only allowed to meet the needs of the textile, chemical, cellulose and paper, grocery, cosmetics, pharmaceutical, construction materials and seed production industries. Cultivation of hemp for purposes other than those listed above is prohibited.

The CDA forbids illegal possession of narcotic drugs, psychotropic substances and their precursors. Law enforcement authorities or Customs will seize illegal products in accordance with the provisions of the Code of Criminal Procedure.<sup>135</sup> As mentioned in Section 9.1, if no criminal proceedings have been instituted, the court decides on the forfeiture of narcotic drugs, psychotropic substances and category 1 precursors at the request of the competent pharmaceutical inspector. In such cases, the above-mentioned substances will usually be destroyed.<sup>136</sup>

Article 44b of the CDA prohibits the manufacture and marketing of replacement substances, more commonly known as new psychoactive substances. Under Article 52a of the CDA, the competent State Sanitary Inspector may impose administrative financial penalties on an entity that violates this legislation.

### **Authorization to establish a bank, as a joint-stock company or as a cooperative bank**

The legal basis for establishing a bank is the Act of 29 August 1997 on Banking Law.<sup>137</sup> The Polish Financial Supervision Authority is the competent authority for granting a permit.

In accordance with Article 30 (1) of the Banking Law, a bank may be established if it is ensured that the bank will be provided with its own funds, commensurate with the anticipated banking activities and the intended scale of operations, and that its premises will be equipped with technical facilities appropriate for the proper safekeeping of funds

133 For details, see the English version of the Pharmaceutical law available at: <http://www.gif.gov.pl/rep/gif/pliki/Pharmaceutical%20Law%20-%20June2009.pdf>.

134 Article 47 of the CDA.

135 Article 34 (2) of the CDA.

136 Article 34 (3) and (4) of the CDA.

137 Official Journal of 2012, item 1376 – consolidated version.

and valuables, taking into account the scope and banking activities to be conducted. Furthermore, the founders and persons proposed as members of the bank's management board, including the president, must be able to adequately guarantee the sound and prudent management of the bank, and at least two of the persons proposed as members of the bank's management board must be adequately trained and have the professional experience necessary to manage a bank, as well as proven knowledge of the Polish language. Finally, the founders must submit a business plan for the bank covering at least three years and indicating that this activity will not endanger the funds held in the bank.

A bank's initial capital may not come from a loan or credit or be derived from undocumented sources.<sup>138</sup> Article 33 of the Banking Law allows the Polish Financial Supervision Authority to request additional information if it has questions about the application. If it deems it essential to decide on granting the permit, the Authority can also request information or documents concerning, in particular, the founders and persons proposed as members of the bank's management board, including information on their financial and family situation.

Article 36 (3) of the Banking Law states that a permit to establish a bank may be issued if the bank is capable of commencing business in organizational terms, has assembled the full amount of initial capital, has the facilities suitable for safekeeping monetary funds and other valuables in the context of the scope and nature of the intended banking activities, and meets any other conditions stipulated in the decision to grant the permit.

According to Article 37 of the Banking Law, the Polish Financial Supervision Authority may refuse to grant a permit if the requirements for establishing a bank have not been fulfilled, if the intended banking activities would contravene the provisions of the law or endanger the interests of its customers, if the safety of the funds held by the bank is not guaranteed, and if the provisions of law applicable in the location of the founder's registered office or residence or its relations with other parties could prevent effective supervision of the bank.

The Code of Commercial Partnerships and Companies regulates the establishment and activity of banks operated by joint-stock companies, unless the Banking Law provides otherwise. Banks must inform the Polish Financial Supervision Authority of the composition of the supervisory board immediately after it has been installed and of any changes in its membership.<sup>139</sup> The same applies to the management board.<sup>140</sup>

The appointment of two members of the management board, including the president, is subject to the approval of the Polish Financial Supervision Authority. The Financial

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138 Article 30 (5) of the Banking Law.

139 Article 22 of the Banking Law.

140 Article 22a of the Banking Law.



Supervision Authority may request information and documents concerning these persons to the extent necessary to decide on the approval.

The approval **shall be refused**, if the candidates for the members of the management board:

- have been convicted for intentional or fiscal offences, excluding the offences that are prosecuted upon private accusation,
- were responsible for documented losses at their places of employment or in connection with their functions as members of bodies of legal persons,
- have been prohibited from carrying out business activity on their own behalf or from performing functions of representatives or attorneys of an entrepreneur, members of supervisory boards or audit committees in a joint-stock company, limited company or cooperative,
- do not fulfill the requirements stipulated in Article 30 (1), subparagraph 2 of the Banking Law, as indicated above.
- The Polish Financial Supervision Authority **may refuse** approval for the appointment of 2 members of the management board, where such persons:
  - are the subject of criminal proceedings or court proceedings involving fiscal offences,
  - have been convicted of criminal offences other than those referred to above.

The members of the management board do not require approval to be reappointed for a new term if they have already been approved as members of the first management board. However, if the above-mentioned grounds for refusal of the approval (obligatory or discretionary) are fulfilled, the supervisory board shall initiate the approval proceedings before the Polish Financial Supervision Authority.<sup>141</sup>

As mentioned above, banks may also operate as joint-stock companies. Pursuant to Article 18 § 2 of the Code, a person convicted in a final judgment of offences against the protection of information, document fraud, property offences, offences against trading in currency and securities, and a number of offences indicated in the Code of Commercial Partnerships and Companies cannot be appointed as a member of the management or supervisory boards. As described in Section 9.1.3, information about prior convictions is sent automatically from the NCR to the National Court Register. In such cases, convicted members of the management and supervisory boards will be dismissed from their function *ex lege*, following from Article 18 § 2 of the Code of Commercial Partnerships and Companies.

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<sup>141</sup> Article 22b (6) of the Banking Law.

### **Waste collection and processing**

The Act of 14 December 2012 the Law on Waste constitutes the legal basis for exercising activities in the field of waste collection and processing.<sup>142</sup> The county governor (or, for a city with county rights, the city president) is the competent authority for granting a permit. Permits for processing infectious medical and veterinary waste also require the approval of the General Sanitary Inspector.<sup>143</sup> The Act lists very detailed requirements. A permit will be refused if the intended method of waste management poses a threat to human life and health or to the environment or if it is incompatible with waste management plans or local rules.<sup>144</sup> If such is the case, the competent authority will order the operator to cease the infringements within a given time limit. If the operator fails to comply, the permit will be withdrawn.

#### **9.3.3 Government tenders**

This section concerns cooperation between public and private enterprises that pose a crime risk. For many years now, corruption has been one of the biggest problems associated with the activities of public authorities in Poland, although the situation is improving from year to year.<sup>145</sup> To prevent such irregularities, the delegation of specific tasks to the private sector and the granting of public contracts are subject to regulations intended to ensure the lawful exercise of public duties in the area of public procurement and state aid.

##### **9.3.3.1 Public procurement**

The legal basis for procurement is the Act of 29 January 2004 on public procurement (hereafter referred to as the PP).<sup>146</sup> The procurement process is decentralized and is the responsibility of the individual budget units of the Treasury. These entities determine the detailed terms and conditions of the contract, following the general requirements of the PP Act.

The President of the Public Procurement Office, appointed by the Prime Minister, exercises general supervision over public procurement procedures. The contracting

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<sup>142</sup> Journal of Laws 2013, item 21.

<sup>143</sup> Article 41 (7) of the Act.

<sup>144</sup> Article 46 (1) of the Act.

<sup>145</sup> According to the reports of Transparency International, since 2006 Poland has moved up the list of countries with the lowest rate of corruption in public life. In 1998 Poland scored 4.6 on the perceived corruption index (where 0 is the highest level of corruption and 10 the lowest) and the situation worsened thereafter: 4.2 in 1999, 4.1 in 2000, 4.1 in 2001, 4.0 in 2002, 3.6 in 2003, 3.5 in 2004, and 3.4 in 2005. Since 2006, the perceived level of corruption has decreased: 3.7 in 2006, 4.2 in 2007, 4.6 in 2008, 5.0 in 2009, 5.3 in 2010, 5.5 in 2011, 5.8 in 2012 and 6.0 in 2013 (38th out of 177 countries classified). Reports are available at: [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi](http://www.transparency.org/policy_research/surveys_indices/cpi).

<sup>146</sup> Official Journal of 2013, item 907.

authority prepares an annual report for the President of the Public Procurement Office concerning the contracting procedures finalized that year.<sup>147</sup>

Persons working for public bodies are excluded from procurement procedures if they are related to the economic operator, his legal deputy or members of the management and supervisory boards of these operators by matrimony, consanguinity or affinity, either directly or up to the second degree, or if they are related by means of adoption, legal custody or guardianship. This also applies to civil servants who were once employed by or in the service of the operator that is competing for a contract, or if they were members of the management or supervisory board in the three years preceding the start of the contract award procedure. Civil servants are also excluded if they have a legal or actual relationship with the economic operator that raises justified doubts as to their impartiality, and if they have been sentenced for an offence committed in connection with a contract award procedure, for bribery, for offences against business transactions, or for any other offence committed with the aim of gaining financial profit.<sup>148</sup>

Persons performing actions in connection with a contract award procedure must provide a written statement as to whether the above-mentioned circumstances are absent. Providing a false statement is a criminal offence.<sup>149</sup> According to Article 24 of the PP, operators can be excluded from competing for a government contract if they are, *inter alia*:

- natural persons who have been sentenced for an offence committed in the context of a contract award procedure; for an offence against the rights of people performing paid work; for an environmental crime; for bribery; for an offence against business transactions; and for any other offences committed to gain financial profits, as well as for fiscal offences or for participating in an organized group or association aimed at committing a criminal or fiscal offence.
- collective entities whose partners, management board members or general partners have been convicted of the above-mentioned offences. This applies to registered partnerships, professional partnerships, limited partnerships and limited joint-stock partnerships and legal persons;
- economic operators who have performed actions directly in connection with the preparation of the procurement procedure or have provided false information that impacted or might have impacted the outcome of the procedure.

If an economic operator wants to participate in a contract award procedure, he must declare that he satisfies the conditions. At the request of the contracting authority, he must also submit documents that verify the declaration.

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<sup>147</sup> Jerzykowski 2013, commentary to Article 152, item 1-3.

<sup>148</sup> Article 17 (1) of the PP.

<sup>149</sup> Article 17 (2) of the PP.

Article 180 PP includes a special appeal procedure. It states that an appeal is admissible only if the contracting authority violates the Act in the course of a contract award procedure or if it fails to act when the Act on PP so requires. The appeal must be filed with the President of the National Appeal Chamber of the Public Procurement Office and is examined by the National Chamber of Appeal. If the appeal is admissible, the Chamber may rule as follows:<sup>150</sup>

- a. if the public contract has not yet been concluded, the Chamber may demand performance or repetition or may demand cancellation of action performed by the contracting authority (but shall not order the conclusion of a contract).
- b. if the public contract has been concluded in violation of the Act, the Chamber may invalidate the contract or the parts regarding the unfulfilled obligations and impose a financial penalty in justified cases, in particular when the benefits gained as part of the invalidated contract cannot be returned. It may impose a financial penalty and decide to shorten the duration of a contract if an important public interest, in particular in the field of defence and security, requires the continuation of the contract.
- c. State the violation of the provisions of the Act if the contract was concluded in circumstances permitted by the Act.

The Chamber cannot order the conclusion of the contract. Pursuant to recently introduced amendments of the Act on PP, the Chamber cannot terminate the contract if such termination would endanger the security of the State.<sup>151</sup> The Chamber can impose financial penalties on the contracting authority up to a maximum of 10% of the contract value, taking into account the nature and scope of the violation as well as the total amount of money involved in the contract.<sup>152</sup>

#### 9.3.3.2 Public aid for entrepreneurs

The legal basis for the supervision of public aid is the Act of 30 April 2004 on the procedural issues concerning state aid.<sup>153</sup> The President of the Office of Competition and Consumer Protection is the competent administrative authority.

According to Article 31 of the Act, monitoring of state aid includes the collection, processing and transfer of information regarding state aid that has been granted, in particular the types, forms and amounts of aid, as well as compliance with limitations on cumulative amounts of *de minimis* aid in the agriculture or fisheries sectors. The President of the Office monitors state aid in general, whereas the minister responsible for agriculture monitors state aid in the agricultural and fisheries sectors.

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<sup>150</sup> Article 192 (3) of the PP.

<sup>151</sup> Article 193 under 6 and 6a of the PP.

<sup>152</sup> Article 193 of the PP.

<sup>153</sup> Official Journal of 2007, no. 59, item 404, with amendments.

Bodies granting aid are obliged to prepare periodic reports on state aid that has been granted as well as refused (except in the agricultural and fisheries sectors). These reports must be submitted to the President of the Office and specifically include information on aid beneficiaries as well as on the types, forms, volume and purpose of the aid.<sup>154</sup>

If the entity receiving a subsidy shows inappropriate performance of the duties (especially with reference to providing relevant information), and obstructs inspections, it may be subject to administrative penalties imposed by the President of the Office, up to a maximum of €10,000 (Article 44 of the Act).

#### 9.4 SCREENING AND MONITORING OF ENTREPRENEURS – THE PROCEDURES

Public authorities are allowed to screen the background of natural and legal persons applying for licences, permits or tenders. They can do this at two stages: at the start of the business activities, and in the course of their execution.

In the previous sections, we briefly described the instruments of verification and control applicable during the application process for a licence for a regulated (limited) economic activity. These instruments primarily require prospective entrepreneurs to provide the administrative authorities with certificates to prove that they comply with the conditions set for them. This obligation aims to guarantee that only entities that satisfy certain requirements and have appropriate competences and professional skills engage in economic activities in the most important areas for the state. Apart from this, all natural persons and collective entities that wish to start up a business in Poland must obtain the status of entrepreneurs, regardless of whether the economic activity is regulated. This requires registration in two separate registers. The preliminary registration of natural and legal persons is discussed in Section 9.4.1.

Equally important is to monitor the activity of the entrepreneur after he or she has been entered in the relevant register and after being granted a licence or permit. The previous sections briefly discussed the instruments of control listed in specific acts for selected areas of economic activity. Section 9.4.2 describes the general monitoring procedures that apply to all entrepreneurs, regardless of the type of economic activity.

##### 9.4.1 *Data in central registers*

There are two separate central registers for entrepreneurs in Poland: the Central Registry and Information about Economic Activity, which covers natural persons, and the National Court Register, which covers collective entities.

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<sup>154</sup> Article 32 of the Act.

#### 9.4.1.1 The Central Registry and Information about Economic Activity (CRIA EA)

Articles 23-39 of the FEA Act regulate the CRIA EA. The Minister of Economic Affairs administrates the registry and its database.<sup>155</sup> The register is public. Article 25 of the FEA Act lists the information that must be entered into the register, i.e. the name of company, its personal identification number, its Tax Identification Number, its address and the types of economic activity it will engage in, as well as:

- information on any ban on conducting the economic activity (for example imposed as a penal measure or as a preventive measure in the course of criminal proceedings);
- information on any ban on exercising a specific profession (if registration in CRIA EA is required to do so);
- information on any ban on performing activities related to raising, educating or training minors, or caring for them.

The above-mentioned bans are registered only after being imposed on the applicant in a final judgement by a competent court.<sup>156</sup> However, a temporary ban on exercising a specific profession or on conducting a specific activity may also be imposed on the applicant as a preventive measure in a pending criminal procedure. As mentioned in Section 9.1, the public bodies responsible must inform the appropriate administrative authority about this preventive measure.

Initially, when submitting an application for registration in the CRIA EA, the applicant must provide a statement declaring that no adjudicated bans have been issued. Providing a false statement is a criminal offence. In accordance with Article 26 of the FEA Act, the application can be submitted electronically on a form available on the CRIA EA website or at the competent Municipal Office (which municipality is competent depends on where the economic activity is located).

If the activity is not subject to special regulations, the entrepreneur may start it on the day he applies for registration in the CRIA EA database.<sup>157</sup> Entry into the register is effective no later than the next working day following receipt of a correct application.<sup>158</sup> After this date, the certificate of entry into the CRIA EA is also available on its website. Entry into the CRIA EA does not require an administrative decision.

The registration office can screen the applicant, for instance on his/her criminal past, via the National Crime Register.<sup>159</sup> If the applicant is banned from operating business activities, the system will automatically refuse the registration.<sup>160</sup> If the entrepreneur no

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<sup>155</sup> <http://ceidg.gov.pl>.

<sup>156</sup> All prohibitions indicated in CRIA EA belong to the 'penal measures' as defined in Article 39 of the Criminal Code (see Section 9.1 of this report).

<sup>157</sup> Article 14 of the FEA Act.

<sup>158</sup> Article 25 (3) of the FEA Act.

<sup>159</sup> Article 27 (5) of the FEA Act.

<sup>160</sup> Article 27 (3) of the FEA Act.

longer satisfies the requirement of good conduct, he or she will be removed from the CRIAEA *ex officio* by an administrative decision issued by the minister competent for economic matters. This applies when the entrepreneur has been banned from conducting economic activity in a final decision and if the entry into the register violates the law.<sup>161</sup>

If the person is banned from conducting activities connected with raising, educating or training minors, or caring for them, appropriate information is provided *ex officio* in the registry. Article 31 (5) of the FEA Act states that the National Crime Register must send this information to CRIAEA immediately after the judgment or decision concerning the prohibition becomes final.

Authorities competent to grant a concession or permit or to maintain the Regulated Activity Register have the option – but not the legal obligation – to screen an applicant and check information in CRIAEA (as well as in other registers) on any person applying for a given concession/permit/registered activity (Article 50 FEA Act).

### The National Court Register (NCoR)

The National Court Register is a public database of legal persons. The district courts maintain the NCoR. Registration has the same status as a court decision. The legal basis for the NCoR is the Act of 20 August 1997 on the National Court Register.<sup>162</sup> The Code of Civil Procedure<sup>163</sup> on non-litigious procedures applies to registration.<sup>164</sup> Every entity entered into the Register has its separate register files, including the documents that justify registration.<sup>165</sup> The registered entity is liable if it causes damage by providing false information to the Register or fails to provide information within the statutory time limit required for entry into the Register.<sup>166</sup>

Pursuant to Article 21 of the NCoR, government and local authorities, courts, banks, bailiffs and notaries are obliged to inform the registration court immediately and *ex officio* about events that should be entered into the Register.

Cooperation between the registration court and the National Crime Register is essential. As stated in Section 9.1, the National Crime Register automatically provides the National Court Register with information about convictions and sentences. The competent courts may also request information from the National Crime Register before deciding on registration. Criminal records are relevant in such cases because persons convicted of specific offences<sup>167</sup> are not allowed to act as members of the management and supervisory boards,

161 Article 34 (2) of the FEA Act.

162 Official Journal of 2013, item 1203 – consolidated version.

163 Act of 17 November 1964, Official Journal of 2014, item 101 – consolidated version.

164 Article 7-8 of the NCoR.

165 Article 9 of the NCoR.

166 Article 18 of the NCoR.

167 Any offences against the protection of information, document fraud, property crimes and economic crimes and offences against the trade in money and securities.

the audit committee or as a receiver for the collective entities.<sup>168</sup> The NCoR will automatically detect compliance or non-compliance with these requirements and issue a 'protocol of distrust'. The registration court will subsequently ask the entity to take appropriate action and make the necessary changes in personnel. If the entity fails to comply, the court will refuse or revoke registration.<sup>169</sup>

#### 9.4.2 *The monitoring procedure*

This section concerns the monitoring of entrepreneurs in order to detect business-related criminal activities on the one hand and irregularities on the other. The latter usually involve violations of the conditions set in a concession/permit/regulated activity. With reference to criminal activities, monitoring (control) can take place at three levels.

The first level of control, concerning the basic requirement of good conduct, is exercised upon the entrepreneur's entry into the CRIAEA or the NCoR, and afterwards if his or her criminal record changes. It relates only to the general prohibition to conduct economic activity or to specific prohibitions to conduct the economic activity. When the competent authorities impose a ban, the National Crime Register immediately notifies the CRIAEA or the NCoR.<sup>170</sup> As explained in Section 9.1, criminal courts are obliged to forward the decision to impose a ban to the competent administrative authorities.

Second, the administrative authorities competent to oversee regulated activities exercise the next level of control. This can be viewed as an additional requirement of good conduct. Compliance is monitored permanently after the concession/permit/access to a specific register has been granted. As described in the previous sections, usually entrepreneurs applying for access to regulated activities shall fulfil the requirement of not being convicted for any criminal and fiscal offence or of not being convicted for specific type of offence. Thus, he/she could not access this regulated activity or must be withdrawn from the Regulated Activity Register in case of final conviction for this offence. Information on entrepreneurs is not forwarded automatically. In particular, convictions for criminal offences not resulting in prohibitions mentioned in the FEA Act are not registered in CRIAEA. However, if a final conviction concerns a collective entity, more information on final convictions is available in the NCoR automatically. All authorities granting concessions/permits/entry into a regulated activity have the statutory competence to ask the NCR for the criminal records of entrepreneurs.<sup>171</sup>

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<sup>168</sup> Article 18 of the Code of Commercial Partnerships and Companies.

<sup>169</sup> Michnik 2013, commentary to Article 21a.

<sup>170</sup> Based on Article 31 (5) of the FEA Act – with reference to CRIAEA and on Article 20a of the NCR Act – with reference to National Court Register.

<sup>171</sup> Article 6 (1) point 9 of the NCR.



The third level of control, which can be defined as the highest requirement of good conduct, applies to entrepreneurs who perform a regulated economic activity in very sensitive areas. A person need only be suspected of having committed certain categories of offences to be banned from the economic activity. This requirement applies, for example, to persons running a casino or to persons offering services of protection to persons or property under the relevant concessions. This control involves the activity of the Police or, in case of concession to run casino – customs services. As was mentioned in the first chapter, the authorities granting concession for running a casino shall have access to the NCCI.

Conducting an economic activity without the necessary concession, permit or entry into a register or despite being removed from such a register qualifies as a petty offence.<sup>172</sup> In addition, other acts criminalize engaging in a regulated activity without the required concession, permit or entry into the register.

### **Irregularities in the conduct of economic activities**

The competent administrative authorities also have instruments to respond to irregularities in the conduct of economic activities. The FEA Act (Article 77ff) provides the general basis and rules for monitoring the activity of entrepreneurs. The competent authorities for granting a concession or permit and the tax inspectors<sup>173</sup> can exercise this control, as can the inspectors of the State Labour Inspectorate<sup>174</sup>, the inspectors of the State Sanitary Inspectorate<sup>175</sup>, and the inspectors of the Inspectorate for Environmental Protection.<sup>176</sup>

All these authorities are legally obliged to inform law enforcement agencies of any suspected on-going crimes, following Article 304 § 2 of the Code of Criminal Procedure. This provision also obliges the state or local government institutions that have been informed (by any source) of an offence prosecuted *ex officio* in connection with their activities to immediately forward this information to the state prosecutor or the police. In addition, they must immediately ensure that traces and evidence of the offence are preserved until the officials of an agency authorized to prosecute such offences are present, or until that agency issues a suitable ruling.

172 Article 60<sup>1</sup> Code of Misdemeanours – Act of 20 May 1971. Official Journal of 2013, item 482 – consolidated version.

173 Based on the Act of 28 September 2001 on Fiscal Control. Official Journal of 2011, no. 41, item 214, with amendments.

174 Based on the Act of 13 April 2007 on the State Labour Inspectorate. Official Journal of 2012, item 404 – consolidated version.

175 Based on the Act of 14 March 1985 on the State Sanitary Inspectorate. Official Journal of 2011, no. 212, item 1263, with amendments.

176 Based on the Act of 20 July 2001 on the Inspectorate for Environmental Protection. Official Journal of 2013, item 686 – consolidated version.

The inspection authority must inform the entrepreneur if it wishes to conduct an inspection, unless such inspection (1) follows from directly applicable European Union law or a ratified international agreement, (2) the inspection is necessary to prevent the commission of the offence, a fiscal offence or a petty offence or to preserve evidence of the commission or (3) if there is an immediate threat to life, health or the environment.<sup>177</sup>

Inspections must be carried out in the presence of the entrepreneur or his/her authorized representative<sup>178</sup> unless ratified international agreements state otherwise; the inspection is necessary to prevent an offence, fiscal offence or petty offence or to secure evidence, the inspection is conducted under relevant provisions of the Act on the Protection of Consumers and Competition; or the situation proposes an immediate threat to human life and health and a considerable risk to the environment. If the entrepreneur is unable to be present, he or she is required to appoint a representative to act on his or her behalf during the inspection.<sup>179</sup>

Pursuant to Article 82 of the FEA Act, no more than one inspection shall be carried out at the same time. It is possible to deviate from this rule if (*inter alia*) ratified international agreements allow this; the inspection is necessary to prevent an offence, fiscal offence or petty offence or to secure evidence of such criminal acts; the inspection is exercised under the specific provisions of the Act on Protection of Consumers and Competition; there is an immediate threat to human life and health and a considerable risk to the environment; the inspection concerns the issue of the VAT return before the return is made; and the inspection is carried out based on obligations stemming from EU law aimed at protecting the financial interests of the EU.

Inspections are also subject to time limits. For micro-entrepreneurs the maximum is 12 working days; for small entrepreneurs it is 18 working days; for medium-sized entrepreneurs 24 working days; and for other entrepreneurs 48 working days per year – with exceptions as indicated above.<sup>180</sup>

The inspection authority is authorized to monitor economic activity to check compliance with the scope of the concession/permit/regulated activity and the requirements set for the conduct of the economic activity and for state defence and security as well as the security and personal property of citizens. Authorized inspectors may enter premises, property, facilities or parts of facilities where the economic activity covered by the concession or permit is conducted on working days and during working hours. They are entitled to demand verbal or written clarifications as well as relevant documents and other information carriers, and must be given access to all information related to the scope of the

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177 Article 79 of the FEA Act.

178 Article 80 (1) of the FEA Act.

179 Article 80 of the FEA Act.

180 Article 83 (1) of the FEA Act.

inspection. The granting authority may ask the entrepreneur to rectify infringements within a fixed time limit.

#### 9.4.3 *Instruments directed at preventing the disturbance of public order*

##### 9.4.3.1 **General instruments**

The inspecting authority may uncover indications of crimes and other activities that could threaten public safety during its own inspections or receive them from other sources such as law enforcement authorities and citizens. Article 78 (1) of the FEA Act states that if the economic activity is not conducted in compliance with the provisions of the FEA Act or if it poses a threat to life or health or the risk of considerable damage to property or the environment, the head of the commune (or the mayor or the city president) is obliged to immediately notify the competent administrative authorities. Upon notification, these authorities must immediately inform the head of the commune (or the mayor or city president) of the actions they have undertaken to correct the situation.

According to Article 78 (3) of the FEA Act, the head of the commune (or the mayor or the city president) can decide to suspend the economic activity for no more than three days, if notification is not possible. If life or health is threatened, or there is a risk of considerable damage being inflicted to property or the environment, the economic activity will be suspended immediately. This general instrument applies to all types of economic activity. The FEA Act does not prescribe an exact notification procedure and does not state what is required if the competent (central) authority does not take action within the three-day period. The FEA Act provides no legal basis for the expropriation of premises or administrative closure lasting more than three days. The State Sanitary Inspectorate does have this power, however, based on Article 27 (2) of the Act on the State Sanitary Inspectorate. This article states that violations of hygiene and health requirements causing a direct threat to human life or health allow the competent state sanitary inspector (Voivodship or the Main) to order the shutdown of all or part of a plant (workplace, machinery or other devices), as well as the closure of public facilities, the shutdown of transport, and the withdrawal of food products from the market. This provision applies to factories, shops, bars, and restaurants but also to school cafeterias. The decision is effective immediately. Any information about the threat must also be forwarded to the competent law enforcement authorities.

Article 27c (1) of the Act on the State Sanitary Inspectorate also offers an important control measure that applies to economic activities related to the trading in and manufacture of narcotic drugs and psychotropic substances. This provision states that if there is a justified suspicion that a product (e.g. a new psychoactive substance) is dangerous to life or health, the competent state sanitary inspector must decide to suspend its production or marketing

or order the withdrawal of the product from the market for a maximum period of 18 months, in order to assess its safety. For the purpose of this decision, the state sanitary inspector will seize the product and order the closure of the premises or facilities used to manufacture or market the product for as long as needed to eliminate the threat, up to a maximum of three months.

#### **9.4.3.2 Refusing and revoking a concession/permit, removal from the register of regulated activity**

Most of the laws concerning regulated business activities contain specific provisions related to the refusal or revocation of concessions/permits/or entries into a register of regulated activity. They also, however, often refer to or even repeat the general rules of the FEA Act. Below we address the most important administrative instruments that provide for the termination of a regulated economic activity. These are revocation of a concession, revocation of a permit, and the decision to ban the entrepreneur from a registered activity, resulting in his or her removal from the register.

##### **Revocation of a concession**

Article 58 of the FEA Act states that the competent authority will revoke a concession if a final decision/judgment is issued banning the entrepreneur from the economic activity covered by the concession, or if the entrepreneur failed to undertake the economic activity covered by the concession within a fixed time limit or has permanently ceased to conduct the economic activity covered by the concession.

The competent authority will also revoke the concession or alter its scope if the entrepreneur grossly breaches its conditions or other requirements related to the economic activity and fails to make the necessary rectifications within a fixed time limit. The granting authority may also take such a decision if the security or defence of the state or the security of citizens is threatened, or if the entrepreneur is declared bankrupt or his company is liquidated. Similar reasons apply for revoking or altering a permit or removing someone from the special register.<sup>181</sup>

One exception is the Gambling Law, which has its own rules for the revocation of concessions and is explicitly excluded from the provisions of the FEA Act, although most of the conditions are similar. In accordance with Article 59 of the Gambling Law, the granting authority shall revoke the concession, apart from cases similar to those set out in the FEA Act, (i) if the initial capital of the company operating a casino drops below the level indicated in the Gambling Law, (ii) if a shareholder (natural person) or a member of

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<sup>181</sup> Sieradzka 2013, commentary to Article 58, item 7. See, for instance: Article 17 of the Act on economic activity in the production and trafficking in explosive materials, weapons, ammunition and technology for military or police, Article 33 of The Energy Law, Article 22 of the Act on protection of persons and property.

the management or supervisory board has been convicted of money laundering, or (iii) if more than once, persons under the age of 18 have engaged in gambling activities or collecting bets in the casino. These grounds for revoking a gambling licence are independent and hence do not have to occur in combination with other grounds in order for the licence to be revoked.

Moreover, Article 62 (1) of the Gambling Law offers the Minister of Public Finance a special instrument. If a gambling company offering games within the scope of a state monopoly violates the law or breaches the gambling regulations, the Minister will order the company to rectify this within 30 days. The Minister may revoke the concession if the company fails to comply.

### **Termination of a regulated activity**

Article 68 of the FEA Act states that an entrepreneur who is banned from a specific economic activity in a final decision/judgment by the competent organ will not be entered into the register or will be removed from it. The authority responsible for keeping the register may also decide to ban the entrepreneur from the activity covered by the entry. This decision results automatically in the entrepreneur's removal from the register. In accordance with Article 71 (1) of the FEA Act, reasons for a ban are the submission of a false statement regarding the conditions necessary to conduct the activity, failure to correct a breach of the conditions within the time period set by the authority, or a major breach of the conditions required for the performance of the regulated activity.

The decision to ban the entrepreneur from the activity covered by the entry becomes effective immediately. The competent authority removes the entrepreneur from the Regulated Activity Register *ex officio*.<sup>182</sup>

In accordance with Article 72 (1) of the FEA Act, an entrepreneur who has been removed from the Regulated Activity Register may be re-entered no less than three years after the date of the decision to remove him or her from the register. These regulations apply to all branches of regulated activity.

### **Withdrawal of a permit**

The FEA Act does not include general provisions for the revocation of permits. Below we give examples of specific instruments available to the authorities competent to grant permits for specific economic activities. In addition, we present some examples of other preventive and repressive administrative instruments.

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182 Article 71 (2) and (3) of the FEA Act.

### **Operating a bank**

In accordance with Article 138 (3) of the Banking Law, if a bank fails to comply with set requirements and if its activities contravene either the law or the bank's internal rules, or if it is jeopardizing the interests of account holders, the Polish Financial Supervision Authority, after issuing a written warning notice, may take a number of measures. It may request the discharge of the president, vice president or any other member of the management board found directly responsible for the irregularities noted or suspend from office the members of the management board referred to above, pending the adoption of a resolution to apply for their discharge at the next meeting of the supervisory board. These persons are then excluded from taking decisions on behalf of the bank in respect of its rights and obligations concerning assets. The Financial Supervision Authority may also limit the scope of the banking activity or the activities of its organizational units; impose a financial penalty on the bank of up to 10% of its income indicated in the most recent audited financial statement or, if such a statement is absent, a financial penalty of up to 10% of the estimated income up to a maximum of PLN 10,000,000. It may also decide to revoke the operating permit and to order the bank's liquidation. The latter is an ultimate measure that can be imposed if the above-mentioned instruments have not had the desired effects.<sup>183</sup> Finally, Article 138 (4) of the Banking Law states that the Polish Financial Supervision Authority may also suspend from office a member of the management board if that person is charged with a criminal or a fiscal offence or if he or she has caused the bank major financial losses.

In accordance with Article 138 (6) of the Banking Law, the scope of a bank's activities may also be limited and its operating permit revoked if it no longer complies with the conditions laid down in the permit; if the permit was granted based on falsified documents, untrue statements, or other unlawful actions; if the permit holder has not engaged in any banking activities for more than six months; or if the Polish Financial Supervision Authority has been obstructed in its efforts to effectively supervise the bank.

### **Trade in alcohol**

In accordance with Article 9<sup>5</sup> (1) of the Act on Upbringing in Sobriety and Counteracting Alcoholism, the Minister of Economic Affairs or the competent Marshal of the Voivodeship will revoke permits for the wholesale trade in alcohol if the holder sells alcoholic beverages obtained from illegal sources, if a person who works for the permit holder commits a crime for financial profit, if a final decision/judgment bans the entrepreneur from the activity covered by the permit, or if he commissions the trading in alcoholic beverages to other entrepreneurs on the basis of agreements. The permit may also be revoked if public order

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183 Kohutek 2005.

is repeatedly disturbed at the locations where the company conducts its business.<sup>184</sup> Following revocation of the permit, the entrepreneur can only reapply three years after the decision to revoke is taken.<sup>185</sup>

According to Article 18 (10) of the Act on Upbringing in Sobriety and Counteracting Alcoholism, the competent authority revokes a permit for the retail trade in alcohol if the holder does not comply with the rules specified in the Act. This particularly concerns the selling and serving of alcoholic beverages to minors or to people already under the influence of alcohol, or the selling and serving of alcoholic beverages on credit or in pledge. Revocation may also follow if the permit holder does not comply with the conditions set in the Act, or if the sale of alcoholic beverages results in public order disturbances at the point of sale or its vicinity at least twice within a period of six months and the manager of the point of sale fails to notify the authorities responsible for protecting public order. Other reasons for revocation are if alcoholic beverages obtained from illegal sources are sold; if the manager of the business activities commits a crime for private financial gain; or if the entrepreneur is banned from the economic activity covered by the permit in a final decision/judgment. This also applies to natural persons who work for the entrepreneur holding the permit. After revocation of the permit, the entrepreneur may only reapply three years after the decision to withdraw the permit is taken.<sup>186</sup>

A good example of the closure of a business activity based on various administrative controls is the 'Cocomo clubs' case. In 2013 and 2014, law enforcement authorities received several reports of crimes being committed by the staff or owners of 'Cocomo', a company that operated a network of 12 strip clubs in Poland. These nightclubs were often located in city centres, near historic churches or buildings. A number of customers complained that, after having spent the night in the nightclub, the bill amounted to tens of thousands of PLN, with a maximum of PLN 1 million or about EUR 250,000. Customers suspected that something had been added to their drinks causing them to lose consciousness or control over their bankcards. Employees working at the clubs stated that customers became generous under the influence of alcohol and started buying expensive drinks for themselves and the dancers. Unfortunately, the police investigation resulted in only a few accusations because it was extremely difficult to prove that customers had been the victims of fraud. In addition, there was no evidence that the strippers were engaged in prostitution. After media reports, protests against the Cocomo clubs followed. Next, the local authorities began to check whether the alcohol that was sold in the Cocomo clubs was being distributed in accordance with the requirements of the Act on Upbringing in Sobriety and Counteracting Alcoholism. In some cases the checks revealed irregularities that allowed the

184 Article 9<sup>5</sup> (2) of the Act on Upbringing in Sobriety and Counteracting Alcoholism.

185 Article 9<sup>5</sup> (5) of the Act on Upbringing in Sobriety and Counteracting Alcoholism.

186 Article 18 (11) Act on Upbringing in Sobriety and Counteracting Alcoholism.

authorities to withdraw the liquor permit; this usually resulted in the closure of the club because the profits largely depended on the sale of very expensive drinks. However, the inspections did not always prove that the club had violated the requirements of the Act. Other agencies, such as the sanitary inspectorate, the labour inspectorate, the tax authorities and the building inspectorate therefore carried out additional inspections. In most cases their findings resulted only in fines and not in the closure of premises. In some instances, however, social pressure and protests discouraged customers and forced the clubs to close owing to a lack of business. This was the case with the Cocomo nightclub located in Warsaw city centre in Krakowskie Przedmieście Street. The owner himself decided to close the club because, in his opinion, the 'smear campaign' had made it impossible to run a profitable business.

### **The trade in narcotic drugs and psychotropic substances**

Article 37ap (1) of the Pharmaceutical Law provides general grounds for revoking a permit for this particular activity. One reason is a final judgement/decision banning the entrepreneur from the economic activity. Another is if he or she no longer meets the requirements laid down in legislation relevant for the economic activity covered by the permit.

A permit for the wholesale trade in products subject to the Pharmaceutical Law is revoked if the entrepreneur trades in unauthorized medicinal products.<sup>187</sup> The permit may also be revoked if the entrepreneur obstructs the Pharmaceutical Inspector from carrying out his duties; if the entrepreneur stores medicinal products in violation of the terms set in the permit; if the entrepreneur is unable to start his business within four months of obtaining the permit; or if he is unable to carry out the business covered by the permit for a period of at least six months.<sup>188</sup>

In accordance with Article 82 of the Pharmaceutical Law, the Main Pharmaceutical Inspector notifies the competent Customs authorities if he has revoked a permit.

The Voivodship Pharmaceutical Inspector is obliged to revoke a retail permit if the pharmacy offers unauthorized medicinal products.<sup>189</sup> The inspector may revoke the permit if shortcomings are not dealt with within a designated period; if, despite prior notification, the Pharmaceutical Inspector or the National Health Fund were obstructed from performing their duties; if the pharmacy is repeatedly unable to serve its customers; if the pharmacy was not open for business within four months of the permit being granted; or if the pharmacy is unable to carry out the business covered by the permit for a period of at least six months.<sup>190</sup>

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187 Article 81 (1) of the Pharmaceutical Law.

188 Article 81 (2) of the Pharmaceutical Law.

189 Article 103 (1) of the Pharmaceutical Law.

190 Article 103 (2) of the Pharmaceutical Law.



#### 9.4.4 *Legal protection*

This section concerns legal protection for entrepreneurs against whom the competent authorities have issued decisions related to their activities. Here, we address two general situations. The first applies to cases in which the competent authority has refused to grant a concession, permit, or entry into the appropriate regulated activity's register, or has revoked the concession or permit, or removed the entrepreneur from the relevant register or the CRIAEA. All of these actions constitute administrative decisions. The second refers to decisions taken by the administrative authorities during inspections, for instance concerning the cessation of activities.<sup>191</sup>

##### **Protection granted in an appeal procedure**

Entrepreneurs may appeal administrative decisions concerning an economic activity as well as those imposing administrative penalties to a higher authority in the framework of an extrajudicial procedure. The Act of 16 June 1960 of the Code of Administrative Procedure (hereafter referred to as the CAP) regulates the appeal procedure.<sup>192</sup> Pursuant to Article 127 of the CAP, an administrative decision taken in the first instance is open to appeal to the administrative authority of the next-highest level. Article 17 of the CAP states that for local authorities, this is the Local Government Appellate Board, and for other public authorities it is the competent minister. Pursuant to Article 127 §3 of the CAP, appeal is not possible if the minister or the local government appeal board has issued a first instance decision. However, a party dissatisfied with the decision can request the same body to review the case and for this procedure, the rules applicable in an appeal procedure apply.

An administrative decision only becomes effective after the deadline for appeal has expired, except when the decision is immediately enforceable.<sup>193</sup> In justified cases, the authority competent to hear the appeal may suspend execution of immediately enforceable decisions.<sup>194</sup>

After consideration of the appeal or the request to review the case, the higher-level authority or the competent minister takes an independent decision. The outcome may be that the authority or minister upholds the disputed decision; revokes part of all of the disputed decision and rules on the merits of the case; revokes the disputed decision and discontinues the proceedings; or discontinues the appeal proceedings.<sup>195</sup> The decision in appeal is final and terminates the extrajudicial procedure for the administrative authority.

<sup>191</sup> For example based on Article 78 of the FEA Act or Article 27 Act on the State Sanitary Inspection.

<sup>192</sup> Official Journal of 1960, no. 30, item 168, with amendments.

<sup>193</sup> Article 130 § 1 of the CAP.

<sup>194</sup> Article 135 of the CAP.

<sup>195</sup> Article 138 § 1 of the CAP.

The final decision of an administrative authority may be subject to appeal (action) to the administrative court. The role of administrative courts is to exercise judicial control over public administration. Such an appeal initiates a judicial procedure regulated by the Act of 30 August 2002 on the Proceedings before Administrative Courts (hereafter referred to as the PBAC).<sup>196</sup>

In accordance with Article 145 of the PBAC, after having considered the action, the court issues its judgment. With regard to the action against the decision, it may wholly or partly revoke the decision if substantive law has been violated in a way that had an impact on the outcome of the case; if the law has been violated and there are grounds for resuming the administrative proceedings; or if proceedings have been otherwise infringed in a manner that had a significant impact on the outcome of the case. The court may also dismiss the decision based on Article 156 of the CAP or state that the decision was incompatible with the rule of law. The latter implies that the decision is still legally binding, but such a ruling opens up the opportunity for civil action to claim compensation.

### **Legal protection granted in the context of the FEA Act**

Article 84c of the FEA Act provides a separate and independent opportunity to object to inspections. Substantiated objections must be lodged within three working days of the date on which the authority began its inspection. The inspection activities are then suspended, but the inspection authority may still order evidence related to the inspection to be secured while the objection is being considered. This refers to documents, information and samples of products.<sup>197</sup> The inspection authority must examine the objection within three working days and decide whether inspection should be continued. If it fails to examine the objection within this period, the inspection is discontinued.<sup>198</sup>

In October 2010, the media reported several cases of poisoning by psychotropic substances, resulting in the death of about twelve people, most of them young. Basing himself on Articles 27, 27c and 31a of the Act on the State Sanitary Inspection, the Main Sanitary Inspector ordered that all psychoactive substances known as *tajfun* (typhoon) and similar products be withdrawn from the market throughout the entire country. The Inspector also ordered the closure of all facilities for the production and sale of these substances, which were sold as 'collectibles.' The Main Sanitary Inspector based his decision on the fact that these products posed a direct threat to human life or health. The order was enforced immediately. On a single day, hundreds of sanitary inspectors, assisted by the police, closed the sales points and secured samples of the products. Some of the shop owners appealed against the closure, but without success. Later on, however, the court revoked the closure

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<sup>196</sup> Official Journal of 2002, no. 153, item 1270 with amendments.

<sup>197</sup> Article 84c item 8 of the FEA Act.

<sup>198</sup> Article 84c (12) of the FEA Act.

because the Main Sanitary Inspector had not analysed the products after seizing them and was thus unable to prove that they did indeed pose a threat to human life and health. The Inspector should have produced the results of toxicological tests, and data on the number of poisonings, medical interventions and hospitalizations.<sup>199</sup>

### Protection under civil law

If there are irregularities in the proceedings conducted by public authorities in relation to screening or monitoring activities, an entrepreneur may claim legal protection by way of civil action. In accordance with Article 77 (4) of the FEA Act, an entrepreneur who has suffered damage because of illegitimate inspection activities is entitled to compensation. Article 417 of the Civil Code of 23 April 1964 states that the State Treasury and local government units are liable for any damage caused by an unlawful action or omission while exercising public authority.<sup>200</sup>

## 9.5 OTHER ADMINISTRATIVE INSTRUMENTS TO COMBAT OR PREVENT CRIMES

### 9.5.1 *Administrative instruments to counteract money laundering and financing of terrorism*

#### 9.5.1.1 **Introductory remarks**

Poland is party to international instruments aiming at the prevention and repression of money laundering and the financing of terrorism. Since 2008, Poland has been a party to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. In order to meet with international standards in this field, on 16 November 2000 the Polish Parliament adopted the Act on counteracting money laundering and terrorism financing<sup>201</sup> (hereafter referred to as: the AML).<sup>202</sup> The AML includes administrative requirements for the reporting and monitoring of suspicious financial transactions and tools for the immediate freezing of suspicious bank accounts and transactions by way of administrative decision. It also provides for administrative penalties for not cooperating with the appropriate institutions. These measures correspond with the requirement provided by Article 22 of the FEA Act

199 Judgment of the Regional Administrative Court in Warsaw of 20 February 2012, VII SA/Wa 2338/11.

200 Official Journal of 2014, item 121 – consolidated version.

201 The consolidated text of the Act was published in the Official Journal of 2010, no. 46, item 276, with amendment.

202 The English text of the Act is annexed to the Report of the Fourth Assessment Visit to Poland on Anti-Money Laundering and Combating the Financing of Terrorism, issued on 11 April 2013 and available at: [http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/PL4-MERMONEYVAL\(2013\)2\\_en.pdf](http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/PL4-MERMONEYVAL(2013)2_en.pdf).

that all transactions connected with business activities must be made through bank accounts if the amount of the transaction exceeds €15,000. We will briefly discuss these measures below.

#### 9.5.1.2 The system for reporting suspicious transactions

Article 3 of the AML appoints the Minister of Finance and the General Inspector of Financial Information (hereafter referred to as GIFI), who is appointed by the Prime Minister and holds the post of the Under-Secretary of State at the Ministry of Finance, as the two administrative authorities responsible for combatting money laundering and terrorist financing. A special organizational unit within the Ministry of Finance assists the GIFI.

‘Obligated institutions’ listed in Article 2 (1) of the AML must report cash and suspicious financial transactions to the GIFI. The lists comprises 20 types of institutions and includes, *inter alia*, national banks and branches of foreign banks, financial institutions, credit institutions, foreign legal entities carrying out brokerage activities and commodity brokers, insurance companies offering life insurance, investment funds, notaries, lawyers, legal advisers, foreign lawyers providing legal services apart from their employment, tax advisers, foundations and associations. The list also includes entities that operate in the fields of gambling and currency exchange and entrepreneurs acting under the FEA Act who receive cash payments for goods worth €15,000 or more, including when the money is paid in instalments. The above-mentioned ‘obligated institutions’ are obliged to register such transactions<sup>203</sup> and all other transactions irrespective of the limit of €15,000 if circumstances suggest that they were related to money laundering or terrorist financing (suspicious transactions).<sup>204</sup>

The duty to register also applies when the obligated institution refuses the request to undertake a transaction but is aware or – with due diligence – should be aware that the intended transaction is suspicious.<sup>205</sup> Transactions equal to or exceeding €15,000 that fall under Article 8 (1e) are exempt from registration. This covers situations in which a person transfers money between accounts that he holds at the same bank. Special rules apply to casino operators. They are obliged to register all purchases or sales of gambling chips worth €1000 or more.<sup>206</sup>

Records of suspicious transactions as well as information and documents related to these transactions must be kept for a period of five years, starting from the first day of the year following the year in which transactions were registered.<sup>207</sup> The obligated institutions

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203 Article 8 (1) of the AML.

204 Article 8 (3) of the AML.

205 Article 8 (3a) of the AML.

206 Article 8 (1a) of the AML.

207 Article 8 (4) and (4a) of the AML.

are also required to analyse the registered transactions, document their analysis on paper and keep these documents for the same period.<sup>208</sup>

Pursuant to Article 8b (3) of the AML, the obligated institutions must also take 'financial security measures' with regard to their clients. This entails identification of the client and verification of his identity based on documents or publicly available information; taking steps, with due care, to identify beneficial owners and taking risk-based measures to verify their identity, including information on the ownership and control structure of the customer; obtaining information regarding the purpose and the nature of economic relationships intended by a client; constant monitoring of current economic relationships with a client, therein surveying transactions carried out to ensure that transactions are in accordance with the knowledge of the obligated institution on the client and the business profile of his operations and with the risk; and, if possible, surveying the origins of assets and constant update of documents and information in possession.

These financial security measures apply when the obligated institution concludes a contract with a client as well as when a transaction with a client with whom it has not previously concluded agreements is worth €15,000 or more, including payments in instalment.<sup>209</sup>

Gambling operators are obliged to establish the identity of clients and check their identity at the entrance to the casino or a cash bingo room, regardless of the value of the gambling chips or cards the customer purchases.<sup>210</sup>

As transpires from Article 11 of the AML, the GIFI shall be informed of all registered transactions. The obligated institutions must report non-suspicious transactions worth €15,000 or more within 14 days of the end of each calendar month. They are required to report suspicious transactions immediately.<sup>211</sup> The report must include the date of the transaction, the identity of the parties, the amount, currency and type of the transaction, and the account numbers used to conduct the transaction if applicable.

In the event of a suspicious transaction, Article 12 (1) item 7 of the AML requires that the obligated institutions explain to the GIFI why the transaction was deemed suspicious as well as the information mentioned above. They must also provide the GIFI with additional information on the parties that engaged in the transactions, including data on their private and business accounts, regardless of their use in the suspicious transaction.<sup>212</sup>

The number of 'ordinary' cash transactions reported to GIFI is very high. For example, in 2005, 21,000,000 transactions were reported and in 2009, the number had risen to more than 31,000,000. In 2010, the number of reported transactions exceeded 30,200,000. The

208 Article 8a of the AML.

209 Article 8b (4) of the AML.

210 Article 9c of the AML.

211 Article 12 (2) of the AML.

212 Article 12a of the AML.

average worth of the transactions reported every month is €2,500,000.<sup>213</sup> By comparison, the reported number of *suspicious* transactions with reasons and other required data was considerably lower. For example, in 2008 1287 reports were filed and in 2010 the obligated institutions reported 1462 transactions. The majority of suspicious transactions are reported by banks.<sup>214</sup>

### 9.5.1.3 The role of the General Inspector of Financial Information (GIFI) and the financial intelligence unit

The main tasks entrusted to the GIFI are to gather and analyse information on reported (i.e. suspicious) transactions; to suspend transactions and block bank accounts; to decide on the release of frozen asset values; to transmit documentation supporting a suspicion of a criminal offence to law enforcement agencies; to impose administrative penalties.<sup>215</sup>

The GIFI analyses reports of suspicious transactions, taking into account information provided by other state institutions listed in Article 14 (2) of the AML, such as the Public Prosecution Office, the Central Anti-Corruption Bureau and the tax authority. If the GIFI establishes that money laundering (Article 299 of the Criminal Code) or the financing of terrorism (Article 165a of the Criminal Code) is involved, it transfers the case to the competent law enforcement authorities.

As indicated above, the GIFI also has the administrative power to suspend suspicious transactions or to terminate and block bank accounts. The procedure is as follows. Pursuant to Article 16 of the AML, any obligated institution that receives a customer request to conclude a suspicious transaction, has carried out such a transaction, or has information on intentions to carry out a transaction identified as offences under Articles 165a or 299 of the Criminal Code (financing terrorism and money laundering respectively), is obliged to inform the GIFI promptly in writing and to hand over all data concerning this transaction. The obligated institution must also mention the prerequisites in favour of suspension of the transaction or blockage of the account, and indicate the expected date of their implementation. If the notifying obligated institution is not the one that would carry out the transaction, it must clarify which other institution is competent to suspend the transaction or block the account. After the GIFI has confirmed receipt of the notification, the obligated institution must wait 24 hours for a decision as to how to proceed with the transaction covered by the notice.<sup>216</sup>

The GIFI analyses the notification and if it concludes that the (intended) transaction is related to a criminal offence referred to in Article 165a and Article 299 of the Criminal Code, it may – within 24 hours of the date and time indicated in the confirmation of receipt

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213 Wójcik 2011, p. 387.

214 Wójcik 2011, p. 389.

215 Article 4 of the AML.

216 Article 16 (4) of the AML.

of the notification – issue a written request to suspend the transaction or block the account for a maximum of 72 hours. The GIFI can initiate this procedure *ex officio* without notifying the obligated institution.<sup>217</sup> However, the competent public prosecutor within the framework of a criminal investigation must decide whether this period is to be extended.<sup>218</sup> Parallel to the request to suspend the transaction or block the account, the General Inspector informs the competent public prosecutor of the fact that a crime may have been committed and forwards to him all information and documents concerning the suspended transaction or the blocked account.<sup>219</sup> The obligated institution is bound by the decision of the GIFI and obliged to execute the decision immediately upon receipt.

In practice, it is considered much more effective to block an account than suspend a transaction. This is illustrated by the low and declining number of suspended transactions (from 26 in 2002 to two in 2011), whereas the number of blocked accounts increased from eight in 2003 to 314 in 2011.<sup>220</sup>

Chapter 5a (Article 20d-20e) was added to the AML in 2009 for anti-terrorism purposes.<sup>221</sup> It obliges the obligated institution to freeze assets, except for movable and immovable property, following provisions included in European Union law and domestic legislation adopted to comply with obligations under international agreements or resolutions to which the Republic of Poland is party. The GIFI takes an administrative decision *ex officio* concerning the release of frozen asset values.<sup>222</sup>

#### 9.5.1.4 Control of obligated institutions and imposition of administrative penalties

The GIFI and the Financial Intelligence Unit (FIU) have the important preventive role of monitoring the duties of obligated institutions to register and report financial transactions. Pursuant to Article 21 (2) of the AML, FIU inspectors, authorized in writing by the GIFI, carry out the inspections. In specific cases institutions other than the GIFI are responsible for monitoring: the President of the National Bank of Poland inspects operators of currency exchange offices and the competent heads of Customs inspect operators of games of chance, mutual bets, and electronic gambling machines.<sup>223</sup> Inspectors have the following powers:<sup>224</sup>

- On request, the obligated institution is required to disclose and immediately present all documents and materials necessary for the inspection, with the exception of documents and materials containing classified (secret) information.

217 Article 18a of the AML.

218 See Rutkowska-Tomaszewska 2013, p. 546-547. Article 19 of the AML.

219 Article 18 (1) of the AML.

220 Szczuciński 2013, p. 175.

221 Act of 25 June 2009 amending the AML, Official Journal of 2009, no. 166, item 1317.

222 Article 20e (5) of the AML.

223 Article 21 (3) of the AML.

224 Articles 22 and 23 of the AML.

- The obligated institution must provide timely explanations to the inspectors at their request.
- Inspectors are entitled to access the facilities and premises in the presence of a representative of the obligated institution.
- Inspectors can access documents and other documentation covered by the scope of the inspection and obtain certified copies.
- Inspectors may demand oral and written explanations from the employees of the obligated institution relevant for the inspection.
- Inspectors can move freely within the premises of the obligated institution.

The inspection report is to be sent to the GIFI within 14 days. The outcomes are also presented to the obligated institution. The latter has the right to notify the GIFI of any substantiated objections it has with regard to the inspection report. The GIFI considers the objections and gives its written opinion to the complainant within 30 days.<sup>225</sup>

The GIFI submits the inspection report to the authorities exercising supervision over the obligated institutions as well as to the authority appointed to prosecute offences, in the case of substantiated suspicions of an offence.<sup>226</sup> If the obligated institution is regulated by the FEA ACT, the inspection report is submitted to the authorities competent to grant concessions or permits for the business activity.

Furthermore, in accordance with Article 21 (3c) of the AML, the inspection may be carried out at the request of the Ministry of Finance if the obligated institution is in the process of applying for a concession or a permit for an activity regulated by the Gambling Law of 19 November 2009.

The GIFI is also competent to impose administrative penalties on obligated institutions if they do not comply with their duties following from the AML. A maximum penalty of PLN 100,000 applies to, *inter alia*, the following breaches of the AML:<sup>227</sup>

- failure to register ordinary and suspicious transactions;
- failure to provide the GIFI with the documents relating to these transactions;
- failure to keep records of the transactions or documents relating to these transactions for the required period of time;
- failure to carry out the risk analysis essential for applying appropriate financial security measures;
- failure to apply financial security measures.

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225 Article 25 of the AML

226 Article 27 of the AML.

227 These are listed in Article 34a of the AML.



Higher penalties up to a maximum of PLN 750,000 may be imposed for breaches of EU law (Regulation 1781/2006) or for refusal to freeze the asset values, as required by the AML (Article 34b and 34c of the AML).

#### 9.5.2 *Temporary blocking of suspect funds by banks*

The GIFI may request temporary blocking of a bank account if it suspects that the account has been used to finance terrorism or for money laundering.<sup>228</sup> The Banking Law offers a separate legal basis for blocking funds in bank accounts when there are substantiated suspicions of criminal activity. Pursuant to Article 106a (3-8) of the Banking Law, if there are indications that some or all of the funds held in a bank account stem from or are connected with an offence other than those referred to in Article 165a and Article 299 of the Criminal Code, the bank may block the funds. The bank's decision to block the funds is not open to appeal.

The funds blocked cannot exceed the amount suspected of coming from criminal activities and they may not be blocked for longer than 72 hours. Immediately after blocking the funds, the bank notifies the public prosecutor. Before the 72-hour time limit expires, the prosecutor must decide whether to initiate criminal proceedings and notify the bank of his decision. The block is lifted if the public prosecutor decides not to initiate criminal proceedings. Customs may also request the blocking of suspected funds in bank accounts.

#### 9.5.3 *Permit required for possession of firearms or ammunition*

The Act of 21 May 1999 on weapons and ammunition (hereafter referred to as the AWA) regulates the possession of firearms and ammunition.<sup>229</sup> According to the AWA, possession of firearms, including military firearms, firearms for hunting, sporting firearms, gas weapons, alarm and signal weapons as well as ammunition for firearms, is not allowed without a permit issued by the Voivodship Police Commander who holds jurisdiction over the applicant's place of residence.

As transpires from Article 10 of the AWA, the competent policy organ may issue a permit if there is no risk that the applicant will use the weapon on himself; if the applicant does not pose a threat to public order and public security; or if the applicant has a justified need for the weapon. The latter may apply if there is a real and above-average risk to applicant's life, health or property. These are applicants who request a permit for the purpose of personal protection and the protection of persons and property.<sup>230</sup> Permits may

<sup>228</sup> Article 165a or Article 299 of the Criminal Code.

<sup>229</sup> Consolidated text published in: Official Journal of 2012, item 576.

<sup>230</sup> Article 10 (3) point 1 of the AWA.

be granted for activities such as personal protection, the protection of persons and property, hunting and sports (this list is not exhaustive).

The firearms permit is issued in the form of an administrative decision that mentions the purpose for which the permit was granted as well as the type and number of firearms covered by the permit.<sup>231</sup> In accordance with Article 15 of the AWA, the firearms permit cannot be issued to persons who:

- are under 21 (unless the firearm is used exclusively for hunting or sport);
- suffer mental disorders as defined in the Act of 19 August 1994 on the protection of mental health;<sup>232</sup>
- have significantly reduced mental and physical abilities;
- suffer from a significant psychological dysfunction;
- are addicted to alcohol or psychoactive substances;
- do not have permanent residence in Poland;
- pose a threat to themselves, public order or public security (this prerequisite concerns:  
a) persons convicted in a final judgment of the court of an intentional criminal or fiscal offence; b) persons convicted in a final court judgment of an unintentional crime against life or health or of an unintentional crime against motor traffic safety committed in a state of insobriety, under the influence of an intoxicant, or when the perpetrator fled the scene of the crime).

The applicant must furnish the police with certificates issued by authorized doctors and psychologists proving that he or she complies with the above-mentioned medical and psychological requirements. Moreover, the permit holder must submit such certificates to the police every five years.<sup>233</sup> If a doctor or psychologist concludes that the applicant does not comply with the requirements, he must immediately inform the police accordingly.

As transpires from Article 18 of the AWA, the competent police department will withdraw the permit if the person to whom it was issued:

- does not comply with the conditions specified in the permit;
- no longer complies with the requirements set in Article 15 of the AWA (see above);
- breaches the duty to report the loss of his firearms;
- carries discharged weapons or holds the weapons when intoxicated with alcohol or psychotropic substances.

The permit may be withdrawn if the person to whom it was granted breaches one of the requirements set in the AWA. This may concern obligations to register the firearms, to

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<sup>231</sup> Article 12 (1) of the AWA.

<sup>232</sup> Official Journal of 2011, no. 231, item 1375.

<sup>233</sup> Article 15 (4) of the AWA.

undergo medical and psychological examination or to report moving to another place of permanent residence, and the prohibition on placing the weapons into the hands of unauthorized persons.<sup>234</sup>

The firearm may only be sold to persons who have a valid permit for the specific type of firearm. A person selling a firearm or the relevant ammunition must immediately inform the competent police organ.

The police keep records of all legal firearms in Poland and of the permit holders in a central national register administrated by the National Police Commander. The information stored in the register is very detailed and comprises:

1. personal data on all permit holders; personal data on all persons allowed to possess a firearm under specific regulations (such as police officers); personal data on all persons applying for a permit; personal data on all persons in possession of a registration card for the weapon;
2. all official information and opinions concerning the above-mentioned persons collected in the course of the permit application procedure;
3. information about the number, type and identification features of all firearms in possession of the persons indicated above.

Illegal possession of firearms or ammunition constitutes a criminal offence subject to a sentence of between six months and eight years.<sup>235</sup> Production of or trading in illegal firearms is subject to a penalty of up to ten years.<sup>236</sup> Breaches of duties stemming from the AWA constitute petty offences and are subject to a fine.<sup>237</sup>

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<sup>234</sup> Article 18 (5) of the AWA.

<sup>235</sup> Article 263 § 2 of the Criminal Code.

<sup>236</sup> Article 263 § 1 of the Criminal Code.

<sup>237</sup> Article 51 of the AWA.

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## 10 THE ADMINISTRATIVE APPROACH IN SPAIN

A. Huesca & J.E. Conde

### 10.1 INTRODUCTION

#### 10.1.1 Context

As a starting point, it is important to note that Spain has no national policy concerning an administrative approach to crime. Under Spanish national law, administrative authorities cannot have the same competences as law enforcement authorities. There are administrative measures and tools that can be used in the Spanish context, however.

Given this context, this country report will discuss the Spanish administrative structure and traditional law enforcement in order to address the various topics proposed in the underlying ISEC research. The report focuses on the following main question:

*Which administrative instruments exist in Spain to prevent serious and organized criminals from using/misusing the legitimate system of public administration ('administrative approach')?*

One needs to bear in mind that there is no link between the everyday workings of public administration and the security services in Spain. Currently, there is no system of organized crime prevention. The police or the judicial system tackles organized crime using traditional law enforcement measures. Punitive actions are the main tool used to address organized crime in Spain. The information in this report has been updated to March 2014.

#### 10.1.2 A brief description of current police action

Organized crime is more a political concept than a legal one, which allows for a wide range of different interpretations. From a criminological and sociological standpoint, various theories have been put forward to explain crime and criminal behaviour. For instance, Vélez<sup>1</sup> points out that explanations of the specific aetiology of organized crime are rare. Modern theories are based on the notion that organized crime and legitimate markets

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1 Vélez Rodríguez 2008, p. 93.

coexist and are closely related. The line that separates 'good from evil' is unclear: 'organized crime is the response to a market, rather than a creation of it, as it was originally thought.'<sup>2</sup>

This theory suggests that if legitimate markets are part of a globalized economy, this creates space for organizations and groups considered illegitimate.<sup>3</sup> The preventive administrative approach to organized crime, which proposes the use of administrative measures, is based precisely the notion that organized crime is an adapted form of delinquency within the context of national socio-economic reality.

However, the Spanish system continues to use the traditional law enforcement approach to organized crime, based on the application of the Spanish Penal Code and what is known as 'police action'. The Spanish security forces at the national level are the Cuerpo Nacional de Policía (CNP) and the Guardia Civil. Both have mainly the same functions, the difference being that the CNP acts only in urban areas. These are the two main law enforcement authorities assigned to tackle organized crime, and they play a special role in the areas of drug trafficking, financial fraud, money laundering, corruption and contraband. The CNP resides hierarchically under the Ministry of the Interior, the Guardia Civil under the Ministry of the Interior and the Ministry of Defence. There are also autonomous police forces (which are part of the Autonomous Interior Ministries<sup>4</sup>) and, to a lesser extent, local police forces (which fall within the scope of local administrations<sup>5</sup>). The work of the customs monitoring services, which is part of the Tax Office's Department of Customs and Excise Duty (AEAT), should also be noted.<sup>6</sup>

The profile of organized crime in Spain is shown in the following table.<sup>7</sup>

#### Main illegal activities:

- drug trafficking;

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2 Gómez Céspedes 2003, p. 79.

3 Vélez Rodríguez 2008, p. 93.

4 There are four autonomous police forces: The Foral Police of Navarra (created in 1928); the Ertzainza, in the Basque country (created in 1982); the Mozos de Escuadra, part of the Catalanian Government (created in 1983) and the Canarian Police (created in 2010). The Valencian Government, the Principality of Asturias, the Autonomous Community of Aragón, the Autonomous Community of Andalucía and the Autonomous Community of Galicia were assigned autonomous police forces, i.e. part of the National Police organization. In the remaining Autonomous Communities (up to 17), the National Police acts directly.

5 Local police are subject to the legal regime of Organic Law 2/86 of 13 March of the state's security bodies and forces.

6 The Customs Security Forces (SVA) are of special interest with regard to organized crime, given that their responsibilities include drug trafficking, financial fraud, money laundering, organized crime, corruption and contraband. Law 31/2010 of 27 July recognizes its civil servants as Public Officers and the SVA as a State Security service. Customs Security collaborates with European bodies such as the European Office Against Organised Crime or the World Customs Organisation and has a presence within the Central Intelligence Agency Against Organised Crime (CICO) together with members of the Security Forces. Source: SVA News Journal, <http://noticiassva.blogspot.com.es/>.

7 Ministry of the Interior 2010.



- crimes against property and the socio-economic order;<sup>8</sup>
- money laundering;

Other illegal activities:

- illegal migration routes and networks control;
- human trafficking;
- document forgery;

Emerging activities (integrated within those mentioned above)

- cybercrime.

Spain's *Strategy Against Organized Crime 2005-2010* created the Centre of Intelligence against Organized Crime (CICO) in 2006. It was entrusted with: 'the elaboration of intelligence as well as the establishment of criteria for operational coordination between services in the event of overlap between investigations, if necessary.' The CICO consists of police officers and civil guards.<sup>9</sup>

The years thereafter saw an increase in the number of specialists working within the National Police and the Guardia Civil, the creation of the Response Against Organized Crime Group (GRECO) and the Guardia Civil teams against Organized Crime (ECO), and the reinforcement of intelligence units. At the same time, police, customs and national and international judicial coordination was enhanced and legislative changes were introduced.

Both GRECO and ECO are operative units empowered to tackle organized crime, such as vehicle trafficking, the copying of credits cards and their fraudulent use, forced robbery, illegal immigration for the purpose of prostitution, arms trafficking and drug trafficking. In their regular investigatory work, they can seek to cooperate with other government and private institutions in order to make effective progress in their enquiries, as in any other crime investigation. Cooperation is mostly intended to collect information.<sup>10</sup>

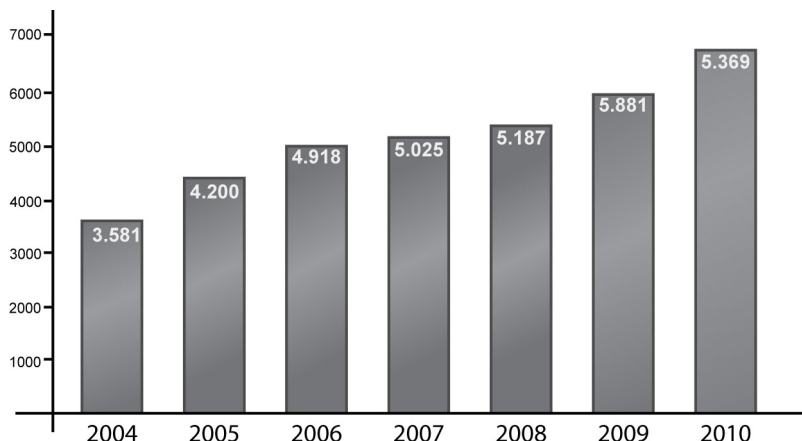
8 'Crimes against property and the socio-economic order' replaces 'crimes against property' in the Criminal Code of 1995 and are: the crimes listed in Title XIII, Book II of the Criminal Code of 1995, which includes theft, robbery, extortion, the theft and use of stolen vehicles, fraud crimes (fraud, misappropriation, theft of electricity and similar), punishable insolvency, changing prices in public tenders and auctions, damage, offences relating to intellectual property, the market and consumers, subtraction of goods of social or cultural value, including corporate crimes as well as related behaviours. *Jurídica* (via: <http://www.enciclopedia-juridica.biz14.com/>). This new introduction of crimes against the social economic order 'reflects the quietness of the Economic Criminal Law legislator against 'white collar' crimes.'

9 Montes López 2011, p. 1-23.

10 Some of the successes are: the *Ballena Blanca* or White Whale operation, which resulted in the dismantling of a major organization dedicated to money laundering; the Wasp operation, which was developed on the Mediterranean coast against criminal groups in Eastern Europe; the Nile operation, culminating in the arrest of over 300 Nigerians who were conducting massive scams, both nationally and internationally; Operation

As a result of these efforts, the police are more efficient and there has been a sustained increase in the number of detainees, as shown in Figure 10.1.

**Figure 10.1** Number of organized crime detainees 2004-2010<sup>11</sup>



Following the success of this first plan, the measures set out in the *Strategy Against Organized Crime 2011-2014* are currently being implemented, with police forces following up with pursuit and prosecution. The measures intend:

1. to strengthen intelligence (reinforcing the CICO, creating a Commission of Coordination against Organized Crime<sup>12</sup>);
2. to attack the organized criminal economy (promoting legal changes which allow for the identification of the owners of businesses and funds, access to bank accounts, tracking of financial operations, and more efficient seizure and management of confiscated assets);

Tull, which led to the capture at sea of a ship carrying a large amount of cocaine and the dismantling of a drug cartel. (See: Press Office of the Government of Spain <http://www.lamoncloa.gob.es/>).

11 Ministry of the Interior 2010.

12 This Commission, presided over by the secretary for State Security, is formed by: the director-general of the Police and the Guardia Civil; the director of the CICO; the director of the CNCA (National Centre of Antiterrorism Coordination); the CNI manager (National Intelligence Agency); the SEPBLAC manager (Executive Service for the Prevention of Money Laundering and Monetary Fraud); the chief prosecutor for Drug and Corruption Prevention and the Commissioner General and Judicial Police Director of the CNP and Guardia Civil. See Ministry of the Interior 2010.

These measures are always executed following prosecution and not used preventively:

1. to attack organized crime's main agenda: drug trafficking, corruption, money laundering, Internet crime, human trafficking, crimes against intellectual or industrial property, value-added tax fraud, falsification and forgery;
2. to reinforce the operative capacity of the National Police and the Guardia Civil by providing further resources and to develop programmes for undercover agents, witness protection, European warrants of arrest, etc.;
3. to encourage international coordination and cooperation;
4. to promote the participation of the public and private sector by creating cooperative channels with the industrial, financial and economic sectors.<sup>13</sup>

### 10.1.3 Introduction to Spanish public administration

The purpose of this section is to describe some of the most important characteristics of public administration Spain in order to provide a basis for understanding the remainder of the report.

Following the same path as other advanced western democracies, the most significant overall change that Spain has experienced in recent decades concerns the presence, size and mission of public administrative bodies within society. Taking Colino's<sup>14</sup> ideas as our starting point, we can state that:

*there have been changes in administrative bodies, such as changes in institutional design, the decentralization or opening up of political-administrative structures to new types of cooperation, formerly in the minority, with other agents and non-public organizations.*

Public administration is made up of institutions that have undergone several changes in western democracies in recent decades, for example due to decentralization; the globalization of regulations, and the re-evaluation of that which is singular and local.<sup>15</sup>

Before considering public administration in Spain, we must review its historical context and the peculiarities that have contributed to its transformation, which have differed from

<sup>13</sup> In the scope of their competence.

<sup>14</sup> Olmeda, Parrado & Colino 2012, p. 11.

<sup>15</sup> In this sense, a bi-directional movement can be seen in Spain: centrifugal, for example the internationalization of the economy, culture, social habits, etc., and centripetal, e.g. key features and local particulars, territorially speaking closer to the lives of citizens. These are simultaneous movements in line with what Roland Robertson calls Beck globalization. Administratively, they have given more power to the sub-national levels of government, primarily the regions, but also municipalities, something that can be problematic because the latter, in particular, have not seen an equivalent increase in financial resources.

those of other countries in the past few years.<sup>16</sup> These peculiarities are based on a series of transitions, including:

- from an authoritarian regime to a democratic system;
- from a regime of mere administrative legality which ignored political liberties and the majority of civil and social rights, to a state governed by the rule of law;
- from a centralist and uniform state to a state made up of Autonomous Regions which formally guarantees the right of the nationalities and regions to self-government and which institutionalizes local autonomy;
- from a state which created a predominantly internal market to a state which abides by the European and international market;
- from a state with very limited social action to a welfare state;
- from an isolated and internationally subordinated state to a state that acts in international political, economic, cultural, development cooperation and humanitarian aid affairs;
- from a closed and authoritarian society to an open society that is appreciative and respectful of diversity, tolerant and plural, enterprising, responsible and caring, politically demanding and active, and increasingly respectful of the constitutional and legal order;
- from an unequal industrialized society to a globalized knowledge-driven society which is demanding a drastic reassessment of the institutional frameworks.

Among all the peculiarities of the Spanish State, the most complex is the system of differing administrative levels that has traditionally accompanied the decentralization processes that run parallel to the expansion of the welfare state. In general, there are three levels: the central level (which also administrates territory by means of government delegations and sub-delegations); the regional level, with seventeen Autonomous Communities whose power is superior to similar tiers of government in many western federal countries; and the local level, where local governments differ from the Provincial Councils.

The subnational scope of government has been revitalized in Spain in recent years (as it has in other European countries), either for functional reasons or owing to socio-political demands linked to the decentralization processes that run parallel to the expansion of the welfare state. This involves administrative agents at a sub-state level playing a key role in the development of key public policies. The reinforcement of autonomous and local governments and administrations has had a very strong impact in Spain on the configuration and functioning of public administration.

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16 Prats 2004, p. 27-102.

Colino<sup>17</sup> highlights the redistribution of human and material forces in the service of different organizations and the creation of strong sub-state bureaucracies. From a functional point of view, this means the redistribution of the roles that administrators carry out as well as changes to the relationship between different government and administrative levels and the citizens, whom receive the closest and most receptive administrative policies. Public administrators are therefore forced to have everyday relationships with administrators at other territorial levels of government:

These levels can be somewhat subordinated to them, formally or informally, and are obliged to institutionalize policies or regulations issued by the administrative unit, or they can be subordinated to others, being funded and regulated by superior levels and obliged to comply or act in a manner conditioned by the superior level. These relationships can reflect legal instruments as well as inter-administrative agreements or committees.<sup>18</sup>

Regarding the competences of Spanish public administration, it is very difficult to create a complete overview here. In general terms, based on the Spanish Constitution of 1978 and the different Statutes of Autonomy, there is a quasi-federal model with exclusive competences divided between the Central State (i.e. citizenship, immigration, emigration, international relations, military defence and armed forces) and the Autonomous Communities (i.e. trains or navigable canals inside their territory). There are also shared competences (including penitentiary regulation, intellectual and industrial property and labour law) and concurrent competences. The latter implies that the Central State approves the basic legislation and the Autonomous Communities approve the legislation and see to its enforcement. This is the case for health care, education and the economy.

According to Article 26 paragraph 1 of Law 7/85 establishing the Framework for the Local Regime, all municipalities are responsible for such services as city lights, cemeteries, sanitation, remediation, water supply, pavements and food safety inspections. Depending on the number of inhabitants of the municipality, more duties are added. For example, a municipality with more than 20,000 inhabitants assumes such duties as civil protection, social services and fire-fighting. Municipalities with 50,000 inhabitants or more assume additional responsibilities in the fields of environmental protection and public transportation. All municipalities with a population of more than 30,000 persons must implement the following public policies:<sup>19</sup>

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17 Olmeda, Parrado & Colino 2012, p. 30.

18 Olmeda, Parrado & Colino 2012, p. 30.

19 Brugué & Gomá 1998, p. 33.

- local and economic promotion policies, including business innovation, attracting businesses, labour supply, infrastructures, etc.;
- urban and territorial policies, including housing, equipment, transportation, etc.;
- local welfare policies, including socio-sanitary policies (health, social services, consumption) and socio-cultural policies (culture, education, youth).

## 10.2 SCREENING AND/OR MONITORING OF NATURAL PERSONS FOR CRIMINAL ACTIVITY

### 10.2.1 *Certificado de Antecedentes Penales (CAP)*

The first screening instrument that we will analyse is the Certificado de Antecedentes Penales (CAP). The CAP is a criminal record and is subject to the Registro Central de Penados (Central Convicts Registry), formally coming within the scope of the Administrative Registries for Judiciary Support<sup>20</sup> along with the Domestic Violence and Gender Victims Registry or the Registry of Judgments concerning the Criminal Responsibility of Minors.

The CAP is a document issued by the Central Convicts Registry and includes all the crimes for which a person has gone to trial and been convicted. It encompasses all the information collected by the Registro Central de Penados, with Article 252 of the Criminal Procedure Code obliging the court clerks to send all the information on a specific case immediately to the Registry after judgment is passed.<sup>21</sup>

According to Article 5 of Royal Decree 95/2009, all the information contained in any of the Administrative Registries for Judiciary Support are accessible to the institutions listed below, subject to prior authorization by the Ministry of Justice:

- the Courts, through the clerks and for the sole purpose of being used in any pending enquiries and/or investigations;
- the Prosecution Office, when necessary to fulfil their duties according to the Criminal Procedural Code, Organic Law 5/2000 on the Minor's Criminal Responsibility and Law 50/1981 of December 30 on the Regulation of the Prosecution Office;
- the person to whom the information in the Registries applies, after proving their identity.

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20 Royal Decree 95/2009, of February 6, in which the Administrative Registrar support to the Administration of Justice system is regulated. BOE n. 33, 7 February 2009.

21 Royal Decree of 14 September 1882 in which the Criminal Procedure Code is approved. BOE n. 260, of 17 September 1882.

Apart from such general access, the Central Convicts Registry involves other authorities that have access to the information, including:<sup>22</sup>

- the Judiciary Police;<sup>23</sup>
- the Weapons and Explosives Intervention Unit of the Guardia Civil;
- the Cuerpo Nacional de Policía units in charge of issuing passports;
- the Cuerpo Nacional de Policía units in charge of customs and entry into Spain.

According to Article 8 of Royal Decree 95/2009, the CAP contains general personal information such as a person's name, alias, gender, date of birth, address, nationality, national identity document or passport number as well as information related to their prosecution or police report. Concerning legal persons, the information consists of their object, nationality, official address, tax address, main activities and tax identification code. Along with the general personal details, the CAP has information on all convictions, both for natural and legal persons. Concerning legal persons, liability is linked to its managers; consequently, the information included into the Registry relates to both the legal person and the manager or managers. The CAP includes the date of the judgment, the date on which it entered into force, the Court that issued the judgment and the relevant articles of the Criminal Code, i.e. the crime<sup>24</sup> itself. Moreover, it includes the punishment, along with other relevant procedural information.<sup>25,26</sup>

As mentioned above, the Central Convicts Registry is not public, which means that save for a few exceptions, only the natural or legal person to whom/which the information refers may request a CAP. This implies that most administrative bodies do not have access to it. Such access is, however, required to prevent organized crime by means of the administrative approach as referred to in the underlying ISEC research. This limitation is contained in Article 136 paragraph 4 of the Spanish Criminal Code:<sup>27</sup>

Criminal records entered into the various Sections managed by the Central Criminal Records Bureau shall not be public. While they are in force, certifications shall only be issued subject to the limitations and guarantees provided for in the specific rules and in the cases established by law. In all cases, certifi-

22 With the exception of cancelled entries; Article 6 of Royal Decree 95/2009.

23 A special police officer in charge of collecting evidence and assisting in trials.

24 Also, from 2011 on, the Registry has included information on minor criminal offences. Moreover, an electronic system is provided for according to the second additional Provision to Organic Law 5/2010: 'The Government, in collaboration with the Autonomous Communities with competence in this matter, will establish, within a year, an electronic system for the registration of minor criminal offences.'

25 See Article 9 of Organic Law 5/2010. This information consists of the location of the court sitting in judgment, registry information, degree of responsibility, preliminary actions, etc.

26 See Article 9 Royal Decree 95/2009 of 6 February 2009.

27 Organic Law 10/1995, of 23 November, Criminal Code. BOE-A-1995-25444.

cations requested by judges or courts of law shall be issued, whether or not they refer to entries that have been expunged, and specifically stating the latter circumstance when applicable.

This article may seem contrary to what is specified in Article 120 paragraph 1 of the Spanish Constitution,<sup>28</sup> which says:

Judicial proceedings shall be public, save for exceptions set out in the laws on procedure.

These exceptions have been implemented through a system in which the names and main data of those convicted are replaced by a pseudonym or a false name in order to protect the reputation and privacy of the criminal.<sup>29</sup> Using this system, all judgments are publicly accessible. They are usually collected in databases, subject to the aforementioned protection of the right to privacy of the persons concerned.

Concerning the limits placed on public and even administrative access to the data included in the CAP, the Constitutional Court, in Judgment 144/1999 of 22 July 1999,<sup>30</sup> ruled that a non-authorized administrative body that requires a CAP is infringing Article 18.1 of the Spanish Constitution.<sup>31</sup> This ruling makes the CAP a matter of privacy and private data, although judgments must be published.

This is unlike other legal systems, for example in the United States, where instruments such as Megan's Law<sup>32</sup> are applied and information on persons convicted of sexual assault is published in their communities. In the USA, the Convicts Registry is published for social reasons; in Spain, it is conceived of as a mere judiciary instrument for evaluating recidivism with a view to future judgments and suspended sentences.<sup>33</sup> This makes the Spanish CAP an instrument of social restitution for former convicts, that upholds such cultural values as privacy, freedom of speech, and rehabilitation.<sup>34</sup>

Generally, a CAP is always required when applying for a job or working in public administration, according to Article 56 of Law 7/2007, of 12 April on the Basic Statute of the Public Worker. Every person who applies for a job as a public servant must therefore obtain and present this document.

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28 Spanish Constitution of 1978. BOE-A-1978-31229.

29 Larrauri & Jacobs 2011.

30 STC 144/1999, BOE Núm, 204 22/08/1999.

31 In which 'The right to honour, to personal and family privacy and to one's own image is guaranteed.'

32 Zgoba et al. 2008.

33 Article 22 paragraph 8 states that aggravating circumstances include the presence of a criminal record and Article 66 paragraph 5 of the Criminal Code sets out the procedural rules regarding Article 22 of the Spanish Criminal Code.

34 Larrauri & Jacobs 2011.



The CAP can only be obtained by the person to whom the information pertains. That person must request the CAP from the Ministry of Justice or the Civil Registry and pay €3.66. The procedure is simple and open to every interested citizen who wishes to consult his or her CAP; applicants can submit their request in person, along with a valid ID, to any office of the Ministry of Justice, the Civil Registry or the Public Service Office (the latter only in the Autonomous Community of Madrid). The whole process does not take more than a week.

The absence of a criminal record is required for persons applying for certain public and semi-public jobs or for the issuing of certain licences and administrative authorizations. In the following pages, we review several areas in which a CAP is required (Table 10.1).

**Table 10.1 Areas in which a CAP is required.**<sup>35</sup>

Profession/Licence	Legislation	Description/Content	Procedure
<b>Lawyers</b>	Art. 13.2a) of the General Statute of the Spanish Legal Profession (RD 658/2001, of 22 June)	<i>'The absence of antecedents that impede a person from working as a lawyer'</i>	To become a lawyer, all candidates must deliver to the Bar Association documents such as their law degree, a copy of their ID and a receipt for the payment of association fees, as well as their CAP. If the CAP shows no criminal record, they are admitted to the Bar Association and can work as lawyers.
<b>Lottery and gambling licences</b>	Art. 13.2a) Law 13/2011, of 27 May on gambling regulation	<i>'Have you been convicted in a judgment issued in the four years preceding the date of application for the authorization certificate'</i>	In the case of Lottery and Gambling Licences, the CAP is only required for the owner of the business when he applies for an activity licence on the premises.
<b>International adoption agencies</b>	Art. 5.9 Royal Decree 142/1996, of 1 October on the legal regime for the operation and enabled associates in international adoption	<i>'That is directed and administered by persons qualified by their ethical standards and by training and/or experience to work in the field of international adoption'</i>	In this case both owners and employees of the Adoption Agency must submit their CAP to the Administration showing that they do not have previous crimes related to or having a potential effect on adoption.

<sup>35</sup> Larrauri & Jacobs 2011.

Profession/Licence	Legislation	Description/Content	Procedure
<b>Currency exchange agents</b>	Bank of Spain Circular 6/2001	<i>'In the recruitment of its agents, owners should require accreditation of the agents having paid the corresponding business tax and, in the case of natural persons, of the absence of a criminal record'</i>	All agents at currency exchange offices are required to present a clean CAP when being recruited; the CAP will be analysed along with their job application.
<b>Auditors</b>	Art. 7.1c) Law 19/1988, of 12 July concerning Auditing	<i>'Persons wishing to be registered in the Official Register of Auditors must: - be an adult. - have Spanish nationality or the nationality of any of the Member States of the European Union, subject to the rules on the right of establishment... - have no criminal record for fraud'</i>	Public Auditors who wish to be registered in the Official Register of Auditors must provide a clean CAP; if they have a criminal record, they will not be able to register.
<b>Bank of Spain</b>	Art. 25.4d) Law 13/1994, of 1 June <sup>36</sup>	<i>'Regulates removal for conviction of a felony, applicants are required to submit certificates concerning their criminal backgrounds in order to apply for the entrance exams'</i>	All agents and employees of Bank of Spain are required to present a clean CAP when applying for a job at a bank; the CAP is examined by the employer when evaluating the person's job application.
<b>Firemen</b>	Depending on each municipality, e.g. Barcelona: Article 2f of the framework governing the call-by opposition to tender for the provision of 30 job offers in the category of prevention service firefighter, firefighting and rescue the City Council of Barcelona, approved by Decree of Municipal management (DOGC 5766, of 30 November 2010)	<i>'Affidavit or clear promise that the applicant has not been disqualified from the exercise of public functions or has been removed for disciplinary reasons from any public administration position'</i>	Firemen, like other public servants, are expressly required to present their CAP along with their application for evaluation; like other prospective public servants, they must have a clean record.

36 Law 13/1994, of 1 June on the Autonomy of the Bank of Spain, BOE-A-1994-12553.

Profession/Licence	Legislation	Description/Content	Procedure
<b>Coaches and goods transport drivers</b>	Article 44 of Law 16/1987 of 30 July, regulating land transport <sup>37</sup>	<i>'For the purposes of this Act, persons are deemed to be of good repute if they have no record of any of the following: (a) a conviction in a final judgment for fraud, subject to a sentence equal to or less than prison, for as long as the sentence has not been cancelled...'</i>	Apart from having a valid driver's licence and having passed the driving theory and practical exam, coaches and transport drivers must provide evidence that they have not committed crimes related to their future activities in transport.
<b>Taxi drivers</b>	Depends on the specific Municipality, e.g. Madrid: Article 28.3 c) of the Ordinance Regulating the Service Vehicle Rental Taxi Meter Apparatus <sup>38</sup>	<i>'Within fifteen working days of publication of the results of the examination, candidates will have to submit documents that meet the following requirements:... c) No criminal record'</i>	Among other personal (residence in Spain and a valid driving licence), tax-related (paying fees) or mechanical (a taxi meter or all technical vehicle inspections) requirements, taxi drivers must show that they have a clean criminal record when applying for a licence.
<b>Public contractors</b>	Article 49 Law 30/2007, on Public Contracting <sup>39</sup>	<i>'Persons may not contract with the public sector in either of the following circumstances: a. if they have been convicted in a final judgment of offences of conspiracy, corruption in international business transactions, influence peddling, bribery, fraud and extortion, crimes against the Treasury and Social Security, crimes against the rights of workers, embezzlement and receiving and related behaviours, offences relating to environmental protection or special disqualification for the exercise of a profession, trade, industry or commerce'</i>	In the case of public contracting, which we will discuss in Section 10.2.4, all persons applying for a governmental tender need to present their CAP and confirm that they have no criminal record and have not committed social security fraud.

37 Law 16/1987 of 30 July, regulating land transport. BOE-A-1987-17803.

38 Ordinance Regulating the Service Vehicle Rental Taxi Meter Apparatus of Madrid. Official Bulletin of the Comunidad de Madrid 13/12/2012 N. 297 p. 52-88.

39 Law 30/2007 on Public Contracting. BOE-A-2007-18874.

Profession/Licence	Legislation	Description/Content	Procedure
<b>Cuerpo Nacional de Policía &amp; Guardia Civil</b>	Resolution 30 April 2010 (last call for vacancies) Article 2.1.f) <sup>40</sup>	<i>'Not have been convicted of a crime, or removed from the service of State, Regional, Local and Institutional Management, or be disqualified from the exercise of public functions'</i>	Persons taking the aptitude tests and undergoing the physical examination for acceptance into the CNP or the Guardia Civil must submit a clean CAP with their applications.
<b>Penitentiary staff</b>	Art 56 Law 7/2007, the Basic Statute of Public Employees	<i>'To participate in the selection processes, persons need to meet the following requirements: ... d) Not have been removed for disciplinary reasons from any government or constitutional or statutory bodies of the Autonomous Communities, or be in absolute or special disqualification from public office or employment by court order...'</i>	In addition to other physical, psychological and personal requirements, all applicants must present their CAP; its absence or the presence of a criminal record will result in their application not being considered.
<b>Judges</b>	Art. 303 Law 6/1985 of 1 July on the Judiciary <sup>41</sup>	<i>'unable to enter in the legal profession to the judiciary: the physically or mentally disabled, those convicted of a felony unless they have obtained the rehabilitation process, as well as those charged with intentional crime whom are non-acquitted or absence of a dismissal order, as well as those without the full exercise of their civil rights.'</i>	All applicants must provide their CAP when applying; any application that includes a criminal record is not considered.
<b>Teachers</b>	Art. 12.d Royal Decree 276/2007, of 23 February <sup>42</sup>	<i>'They have been removed by disciplinary proceedings from the service of any public authorities or have been disqualified from the exercise of public functions.'</i>	All applicants must provide their CAP when applying for admission to the public examination; any application that includes a criminal record is not considered.

40 See Organic Law 2/86 of 13 March, on Security Forces. BOE-A-1986-6859.

41 Law 6/1985 of 1 July on the Judiciary. BOE-A-1985-12666.

42 Royal Decree 276/2007, of 23 February. BOE-A-2007-4372.

Profession/Licence	Legislation	Description/Content	Procedure
<b>Notaries</b>	Article 7.2 of Notary Regulation, approved by Decree of 2 June 1944 <sup>43</sup>	<i>'lack of fitness to enter the notarial profession, making them ineligible to exercise public functions as the result of a judgment'</i>	All applicants must provide their CAP when applying for admission to the public examination; any application that includes a criminal record is not considered.
<b>Parliamentary staff</b>	Internal regulation: <a href="http://www.congreso.es/portal/page/portal/Congreso/Organos/Sec-Gen/CG_B073.pdf">http://www.congreso.es/portal/page/portal/Congreso/Organos/Sec-Gen/CG_B073.pdf</a>	<i>'9.2c) c) Not be disqualified from the exercise of public functions by final judgment'</i>	All applicants must provide their CAP when applying for a place on the public examination; any application that includes a criminal record is not considered.
<b>Private school owners</b>	Article 21.2 b, LO 8/1985, of 3 July, regulating the Right to Education <sup>44</sup>	<i>'They may not own a private schools if they: a) provide services to the state, regional or local education authority. b) have a criminal record for fraud.'</i>	When requesting a Private School Licence from the Ministry of Education, owners must, apart from technical, professional and economic requirements, provide a copy of their CAP; those with a criminal record will not be issued a licence.
<b>Private security companies</b>	Art 8.2b and 10.2 e, f and h of Law 23/1992 of 30 July <sup>45</sup>	<i>'Managers and directors of security companies that appear in the Register referred to in paragraph 1 of the preceding article must have. b) No criminal record'</i>	When registering their enterprise and applying for the licences at the Ministry of the Interior, owners of private security companies must provide their CAP and validate the absence of a criminal record.

For all the cases listed in Table 10.1, the CAP requirement is evaluated in relative terms. This implies that even if the absence of a criminal record is required, the CAP will only be taken into account in cases where a certain criminal record is related to the activity of the job.

43 Notary Regulation, approved by Decree of 2 June 1944. BOE-A-1944-6578.

44 LO 8/1985, of 3 July, regulating the Right to Education. BOE-A-1985-12978.

45 Law 23/1992 of 30 July, of Private Security. BOE-A-1999-2332.

### 10.2.2 *General requirements for starting a business*

The financial and economic crisis, an overall unemployment rate<sup>46</sup> of more than 26%<sup>47</sup> and a youth unemployment rate of 57%<sup>48</sup> have led since 2008 to more liberalized and simplified access to economic activities. Before, not only did such activities require a business licence but entrepreneurs also had to satisfy other requirements for the opening or transfer of businesses.

The economic downturn has led to a series of legislative amendments that allow for quicker, simplified processing of the relevant documents and issuing of licences or regulatory approvals (authorizations). These will be discussed below.

In Spain, economic activity can be subject to an administrative licence or prior authorization by the local board, following the provisions of Article 84 paragraph 1 sub b of Law 7/1985.<sup>49</sup>

1. Local authorities may intervene in the activity of citizens by the following means:

- a. ...
- b. b) Prior licensing and other acts of preventive inspection.<sup>50</sup> However, when concerning access to and the carrying out of service activities falling within the scope of Law 17/2009 of 23 November on free access to service activities and their use,<sup>51</sup> the economic activity is subject to the provisions therein;
- c. ...
- d. Follow-up inspection at the start of the activity, in order to verify compliance with the regulations.

Local bodies are responsible for ensuring the safety of and licensing procedures for economic activities within their territory, as long as these bodies act in compliance with the principles of equality, necessity and proportionality, as is set out in paragraph 2 of the same article:

2. Any intervention by the local authorities will comply with the principles of equal treatment, necessity and proportionality to the aim pursued.

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46 Ministerio de Empleo y Seguridad Social. Servicio Público de Empleo. [http://www.sepe.es/contenido/estadisticas/datos\\_avance/pdf/empleo/evolparoseries.pdf](http://www.sepe.es/contenido/estadisticas/datos_avance/pdf/empleo/evolparoseries.pdf).

47 Expansión: <http://www.expansion.com/2014/01/08/economia/1389175910.html>.

48 El diario: [http://www.eldiario.es/economia/Espana-vuelve-record-juvenil-Europa\\_0\\_215928557.html](http://www.eldiario.es/economia/Espana-vuelve-record-juvenil-Europa_0_215928557.html).

49 Law 7/1985 of 2 April, establishing of the Foundations of the Local Regime. BOE-A-1985-5392.

50 I.e. if municipal by-laws impose special requirements for a certain activity.

51 Law 17/2009 of 23 November on free access to activities and their use. BOE-A-2009-18731.

The general rule set by Article 84*bis* of Law 7/1985 is that no licence or ‘any other preventive means of control’ is required to carry out economic activities. However, exceptions apply:

- in cases where, due to considerations of public order, public security, public health or environmental protection,<sup>52</sup> the activity requires a communication to be issued to the administrative authorities or a statement of accountability;<sup>53</sup>
- in cases of scarcity of natural resources, technical impediments are imposed to the use of public domains in the form of a tariff or in reducing the economic operators in the field.

The aforementioned exceptions allow the Spanish administrative authorities to require a licence to open any business (bars, restaurants and other services to the public) that could affect its surroundings or the establishment itself. This contrasts with ‘regular activities’,<sup>54</sup> where a licence is not required. It is important to note that the issuing of this licence can never be based on the personal situation of the applicant. Instead, the licence is based on ‘technical’ conditions. These technical requirements are intended to ensure that the service provided to citizens is safe, and they are usually based on parameters such as the maximum capacity of the establishment (for example for a nightclub), the electrical system, measures to prevent or avoid noise pollution, protective measures when storing or moving hazardous materials or the protection of heritage objects.

The task of public administrators when implementing the requirements for issuing licences is to prevent or avoid the ‘negative consequences’ that a business might have. This means that the issuing of licences or administrative authorizations is proportional in nature: the more the economic activity impacts its surroundings, the stricter the requirements.

The Royal Decree of 25 May 2012 concerns urgent measures to liberalize the market and certain services.<sup>55</sup> The decree came into effect on 28 December 2012. Through this ‘ephemeral norm’, the requirement of *ex ante* licences became void for ‘retail economic activities and the provision of certain services identified in the annexes to this decree, taking place through permanent establishments, situated in any part of the national territory and whose useful public surface area will not be over 300 square metres’, as long as such establishment did not affect the environment or heritage objects.

52 Regulated by Municipal by-laws on Public Health, Zoning Plans or Environmental Protection Plans.

53 A statement of accountability is a document signed by the claimant in which he states that he is accountable for complying with the requirements and the rules governing access to or the exercise of a right, by which statement the documentation is accredited and he agrees to maintain compliance during the period implied by the recognition or exercise of the right. In contrast, a communication is a document in which an interested party brings his identification data and other applicable requirements for the exercise of a right or for the start of an activity to the attention of the competent public authority.

54 The municipal authority itself makes this distinction. It is beyond the scope of this report to describe all the distinctions made.

55 Royal Decree 19/2012, of urgent measures for commerce liberalization and of certain services. BOE-A-2012-6929.

This decree was received positively in Spain, as it was considered a necessary measure. In the words of the vice-president, Soraya Sáez de Santamaria, it 'seeks to change administrative culture, liberate commerce, simplify procedures, speed up agreements, end bureaucracy and, above all, back entrepreneurs, because at this moment of crisis public administration should open doors for them, not close them.'<sup>56</sup> The decree substituted licence applications by a system of statements of accountability and/or communications for establishments of less than 750 square meters.<sup>56</sup> This new system, commonly known as *Licencia Express*, substitutes the preventive control of activities by an *ex post* system that seeks to ensure compliance with the content of the statement or communication.

This decree is a response to the economic crisis in that it promotes economic investment and consumption in Spain. In 2012 the process of applying for a licence could take up to 24 months. This was a deterrent for entrepreneurs and small and medium-sized enterprises and discouraged communities from zoning more surface area for economic activities.

Another economic measure is Law 11/2007 of 22 June on electronic access for citizens to public services.<sup>57</sup> This law allows for online access to administrative procedures (Art 3.2) by permitting documentation services and licence applications to be requested online. In addition, every citizen has access to information held by public administrative bodies. Law 25/2009 of 22 December 2009<sup>58</sup> modified free access to activities and services and their use. It established a 'single electronic portal'<sup>59</sup> by amending Article 70*bis* of Law 7/1985 of 2 April establishing the Framework for the Local Regime:

In the case of procedures and processes pertaining to service activities and their being carried out under Law 17/2009 of 23 November concerning free access to activities and their use, the people carrying them out will be able to do so through a single economic portal, electronically and long distance, unless the inspection of localities or equipment is involved.<sup>60</sup>

Similarly, local entities, limited of course by their own competences, will guarantee that the providers of said service can access the relevant information and forms required for accessing and carrying out an economic activity. The providers will also gain access to the

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<sup>56</sup> The decree was extended substantially and amended by Law 127/2012 of 26 December on urgent market liberalization measures and certain services, as developed by the previous decree.

<sup>57</sup> Law 11/2007 of 22 June on electronic access for citizens to Public Services. BOE-A-2007-12352.

<sup>58</sup> Law 25/2009 of 22 December 2009 of modifications for its adaptation to free access to activities and services and its deployment. BOE-A-2009-20725. Known as the 'omnibus' law because it amended 47 different state laws.

<sup>59</sup> This system, which includes a Digital ID card, gives every citizen the right to access information held by the administrative body of the State or of an Autonomous Community digitally, without any need to request it from a public office.

<sup>60</sup> Referring to activities with environmental effects.



results and other communications related to these applications. Local entities will push to coordinate and standardize the necessary forms for accessing and carrying out an economic activity.

Due to this system, all Spanish nationals, especially professionals, have complete access to all the information and requirements needed to start a business or to continue their relationship with any level of public administration. If the application cannot be submitted through this single electronic portal, the administrative authorities will at least provide access and information allowing the applicant to submit the application in person at the administrative offices. This is thought to save both administrators and Spanish citizens resources and time.

Since screening or monitoring an applicant's personal criminal history is not possible in Spain within the scope of licensing, as described above, this procedure will not be discussed further here. As explained above, the different activities contained in Law 12/2012 of urgent measures on the liberalization of commerce and certain services<sup>61</sup> are based on the submission of a statement addressed to the local authorities that will be verified at a later moment by administrators.

### 10.2.3 *Requirements concerning subsidies*

#### 10.2.3.1 **Granting of subsidies**

Law 28/2003 describes what is meant by a subsidy<sup>62</sup> and sets out the basic requirements for subsidy recipients. Article 2 defines 'subsidy' as follows:

1. In this law, a subsidy is the lending of money by any of the subjects listed in Article 3 of this law to public or private persons in compliance with the following prerequisites:
  - a. the money is provided without direct compensation from those benefiting.
  - b. the money provided in order to meet certain objectives, execute a project, undertake an activity, adopt a singular behaviour, whether that has already happened or yet to be done or to approve a certain situation, with the beneficiary being obliged to adhere to the material and formal obligations that had been agreed upon.
  - c. the project, action, behaviour or situation so funded has as its aim the dissemination of a publicly useful or socially interesting activity or the promotion of a public aim.

61 See Annex 1, Law 12/2012, BOE-A-2012-15595.

62 Law 28/2003. BOE-A-2003-18089. Lastly amended by Law 17/2012.

Subsidies may be granted to both natural and legal persons. Within the meaning of this particular law, subsidies do not include inter-administrative contributions or the contributions made by the central administration to local administrations. Article 2 paragraph 1 sub 4 states that the following financial benefits will not be considered a subsidy:

- social security provisions;
- old-age pensions for non-Spanish residents;
- aid provisions and economic subsidies for non-residents;
- provisions and aid to persons with toxic oil syndrome,<sup>63</sup> congenital haemophilia or coagulopathies, as well as hepatitis C;
- war pensions and those granted to victims of terrorism;
- pension contributions to the fund for salary guarantees;
- fiscal benefits;
- official credit.<sup>64</sup>

As we can see, only those benefits that pertain strictly to Article 1 of Law 28/2003 are included within the system of subsidies. Moreover, the benefit needs to cover a public aim or empower a certain sector of productivity, be it educational or in assistance. The administration cannot make a profit due to the subsidy.

Subjective criteria for application are included in Article 3, referring to all administrations, whether that is the general administration of the state, the communities or local entities. The article provides a list of persons whom are eligible to receive a subsidy.

### 10.2.3.2 Revocation of subsidies

The revocation of subsidies is regulated by Law 38/2003 of 17 November on subsidies.<sup>65</sup> Article 32 of this law provides for the monitoring of subsidies, saying: ‘the licensing authority shall verify that the grant is properly justified, that the activity is performed and the purpose for which the subsidy has been granted or is being enjoyed has been fulfilled.’<sup>66</sup>

The verification mentioned in Article 32 is regulated by Article 15 paragraph 1 sub b. It imposes a duty on subsidy recipients to:

submit to an audit regarding the management of these funds, to be conducted by the licensing authority, and any other test and financial control that can be performed by the responsible supervisory bodies, both national and at Com-

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63 The Spanish toxic oil syndrome case is a well-known event in which more than 600 people were poisoned and died because they had ingested oil originally intended for mechanical and industrial purposes but sold as olive oil.

64 Credit granted by the Spanish Institute of Official Credit (a lending institution that promotes and assists entrepreneurs).

65 Law 38/2003 of 17 November on subsidies. BOE-A-2003-20977.

66 The administration publicizing the subsidy will be entitled to grant and, if necessary, revoke it.

munity level, providing as much information as required to undertake the above actions.

Article 36 lists reasons for declaring an administrative resolution granting a subsidy invalid, including cases in which it has been demonstrated that credit is inadequate or that the administrative resolution granting the subsidy is fraudulent. Article 37 regulates the invalidity of a subsidy and the recipient's subsequent duty to return the funds (as well as default interest charges). The reasons include:

- a. obtaining the subsidy by distorting the conditions required or hiding facts that would have prevented the recipient from being awarded the subsidy;
- b. breaching some or all of the object of the activity or project or failing to adopt the behaviour underlying the award;
- c. failing to adhere to the obligations or providing no or insufficient justification, under the terms set out in Article 30 of this law and in the rules pertaining to the subsidy, where applicable;
- d. failing to adopt the dissemination measures contained in Article 18 paragraph 4 of this law;
- e. resisting, avoiding, obstructing or refusing to permit tax and financial audits under Articles 14 and 15 of this Act, and breaching accounting, registration or document retention obligations where such makes it impossible to verify the use of the funds received, the actual fulfilment of the object and the regularity of the subsidized activities, or the simultaneous award of subsidies, grants, income or resources for the same purpose by any government or public or private entity, national, EU or international organization;
- f. failing to comply with the obligations imposed by the administration on associates and beneficiaries or with the commitments made by them on the award of the subsidy, provided that they affect or relate to the way they must meet the objectives, undertake the activity, run the project or adopt a behaviour underlying the award;
- g. failing to comply with the obligations imposed by the administration on associates and beneficiaries or with the commitments made by them on the award of the subsidy, other than the above, when it is impossible to verify the resulting use made of the funds received, the actual fulfilment of the objective and the regularity of the subsidized activities, or the award of subsidies, grants, income or resources for the same purpose by any government, public or private parties, national authorities, the European Union or international organization;
- h. adopting a decision which derives a need for reinstatement, pursuant to the provisions of Articles 87 and 89 of the Treaty on European Union;
- i. in all other cases provided for in the regulations.

Based on the above, the responsible authorities, i.e. any institution providing the subsidy, have a double duty. On the one hand they are responsible for publishing, checking, receiving and evaluating all subsidy requests. On the other hand, they are obliged to monitor the compliance of the applicants and/or recipients with the law, in particular Article 37.

#### 10.2.4 *Requirements concerning government tenders*

##### 10.2.4.1 **Award of tenders**

The applicable legislation on tenders is the revised text of the Law on Public Sector Contracts<sup>67</sup> and the General Regulation of the Law on Public Sector Contracts.<sup>68</sup> Government tenders are defined under Spanish law as ‘the process by which any public sector entity selects a person (either natural or legal) to perform any work, provide a service or meet a public need.’<sup>69</sup>

The huge variety and number of performance options that this public contracting system offers affects all parts of the Spanish administrative system, whether the authorities are national, regional, or local. All the related activities must be in compliance with the Law on Public Sector Contracts, which regulates the basic conditions for issuing government tenders. A key instrument in the system of Spanish public procurement is ROLECE. This is the Official Registry of Tenderers and Classified Companies. ROLECE has been integrated into the structure of the Tax Office and the Public Administration Ministry.<sup>70</sup> However, the norms concerning government tenders are not applied uniformly to all public entities. Instead, the legislation applies at three different levels, for the following categories of entity:

- public administration;
- public sector entities that have the character of public administration but are subject to Directive 2004/18/EC (not civil contracting authorities);<sup>71</sup>
- public sector entities that are not part of public administration and are not subject to this Directive.

Entities not considered part of public administration must issue instructions ensuring that recruiting procedures are, in all cases, subject to the principles of openness, competition, transparency, confidentiality, equality and non-discrimination. Furthermore, they need

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67 Approved by Legislative Royal Decree 3/2001 of 14 November.

68 Royal Decree 1098/2001, of 12 October.

69 As expressed in Article 2 paragraph 1 of the revised text of the Law on Public Sector Contracts, approved by the legislature via Royal Decree 3/2001.

70 Rule 817/2009, dated 8 May.

71 Directive 2004/18/EC, of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

to ensure that the contract is awarded to the person submitting the most economically advantageous tender. The most common contracts awarded by the administrative authorities are:

- work performance contracts;
- service contracts;
- supplies contracts;
- management of public services contracts;
- public works concession contracts;
- partnership contracts between public services and the private sector.<sup>72</sup>

Individuals or corporations are entitled to contract with the public sector, whether they are Spanish or foreign and provided they have full capacity to act. They cannot be banned from being hired and they must prove their economic, financial and technical or professional competence and, when necessary, be properly classified.<sup>73</sup> The prohibitions against contracting are identified as impediments, making the participation of natural, legal private and public persons legally feasible in the public tendering system.

The Spanish legal system imposes other general requirements for public contracting, such as capacity requirements and financial solvency, and rules for ensuring ‘fairness’<sup>74</sup> and equal opportunities. Additionally, direct recruitment is expressly prohibited for specific reasons. These reasons are linked to the prior behaviour of candidates or their current personal situation, for example if that person acted unlawfully when contracting with the administration in the past.

Furthermore, an entity that is disqualified from contracting with government because it fails to meet the capacity and solvency requirements may be subject to the nullity sanction. As mentioned above, the law requires fitness to contract and consequently puts limits on the possibility of contracting with the public sector. If these requirements are violated, existing contracts are declared null and void. A contract can be declared null and void any time irregularities arise. Consequentially, any effect created in line with that contract legally ceases to exist. Nullity is declared when a violation of the requirements for public contracting is discovered. The contract will be declared null and void if it has already been awarded, and the contract will be terminated by its being dissolved. To prevent damage to the public interest, the contracting authority may decide to continue the contract for as long as needed.

72 Partnerships differ from other public contracts in duration. Most public contracts are intended for a limited time and/or for a concrete project carried out by the private sector. Partnerships suppose a longer contractual relationship in which several projects can be carried out.

73 Article 3 of the revised text of the Law on Public Sector Contracts, approved by Legislative Royal Decree 3/2001.

74 Understood as the transparency and integrity of the future contractor. When reviewing the documentation submitted to obtain a tender, the authorities should preferably select enterprises that have no prior record of insolvency or corporate sanctions.

Public contracting is prohibited for certain natural or legal persons. These prohibitions aim to prevent those who have committed unlawful acts from obtaining public contracts, for example persons guilty of fraudulent or criminal activity, fraud involving subsidies, non-compliance with tax or labour law, etc. Section 60 of the Law on Public Sector Contracts (TRLCS) provides for several kinds of impediments. Some are based on convictions relating to certain criminal offences such as labour offences, tax offences, fraud, bribery and environmental crimes. Other impediments relate to previous breaches of obligations by the tenderer. These might have been either legal obligations provided for in Public Procurement Law or other legal provisions (e.g. tax provisions referring to the obligation of being up to date on payment of taxes), or obligations set out in previous contracts awarded to the tenderer. There are also impediments related to administrative offences, such as tax administrative offences and social security offences. In these cases, the law requires the administrative offence to be enforced. The relevant authority must register established impediments in ROLECE. This way the contracting authority can verify that tenderers to a specific tender are not affected by any kind of impediment. It is important to highlight that the contracting authority must check ROLECE in all public procurement procedures during the selection process.

In accordance with community planning, in addition to applicants having committed certain crimes, administrative offences or irregularities committed in prior contracts can also lead to their being banned from public contracting.

Under Spanish law, prohibitions on hiring are basically directed at individuals. However, more recently Spain has recognized – in part owing to the influence of Community law – that legal persons also commit crimes. Nonetheless, the criminal liability of the legal person depends on the actions of the natural persons involved, as they act for the legal person. (Legal) persons are prohibited from tendering when they have been convicted of a crime under Spanish contract law and a judge or the court considers that there are enough grounds for direct exclusion and verifies this. The contracting authority itself can evaluate or estimate the contractual impediment and any other tenderer may show that such an impediment exists, provided that the court in question has also ruled on the scope and duration of the ban.

This procedure is based on a prior statement indicating a prohibition on contracting. The Ministry of Finance is competent to commence the procedure for issuing a ban. The decision is issued at the recommendation of the Administrative Contracting Advisory Board. Moreover, the scope and duration of the ban is registered in the Official Register of Tenderers and Classified Companies. In general terms, this provision only applies for impediments that require a resolution issued by a third party, either a judicial authority, or an administrative body that is not the contracting authority. It is important to note that this third party has a legal obligation to report such sentences or statements to the authorities in charge of ROLECE and, likewise, that the latter authorities can request data

from the third parties mentioned above, ensuring that the relevant information is duly transmitted.

When a tender is granted or refused, the interested individual or company may participate in further tenders if there is no cause for invalidity or impossibility as mentioned before. However, the whole application process on which the offer and the candidate will be screened recommences on the submission of a new application.

#### **10.2.4.2 Refusal or revocation of a tender**

As discussed in paragraph 10.2.4.1, government tenders are regulated by the revised text of the Law on Public Procurement, approved by Legislative Royal Decree 3/2011,<sup>75</sup> on 14 November. Regarding the revocation or refusal of tenders, two different forms exist: **invalidity** and **nullity**.

Invalidity is regulated in Article 31 of the aforementioned law. All contracts with the public administration system are invalid if the clauses in the tender are illegal or the preparatory acts or the process undertaken to gain the tender are illegal. Another cause for invalidity is contained in Article 36 of Law 30/2007, which refers to invalidity as encompassed by the general Spanish civil law on contracts. After all, contracts with the public sector must adhere to the regulations on regular contracts as well. The monitoring process for detecting these invalidities is subject to the general administrative process as regulated by Law 30/92 and Article 34 of Law 30/2007.

Nullity exists when, according to Article 37 of Law 30/2007, there are procedural mistakes that do not permit all (potential) contractors to participate freely in the tender, i.e. a government tender will be null and void if it is not publicized.

All legal claims against the award of public contracts subject to either the EU Directives on Public Procurement or the Spanish national rules discussed above can be submitted to independent administrative bodies known as ‘public procurement tribunals’. These independent administrative bodies will rule on the claim and can declare the award or the phase that has been the subject of the claim null and void, with full effect. In fact, this declaration has the effect of a judicial resolution and can only be revoked by a judicial court.

Needless to say, this declaration has mandatory consequences for the contracting authority. It should be noted that under Spanish law, legal claims against the award of these contracts automatically mean the suspension of the public procurement procedure until the independent administrative body rules on the claim. In the case of a legal claim against the recipient, then, the public contract will not be concluded until the award has been declared legal by the relevant independent administrative body.

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75 Revised Text of the Law on Public Sector Contracts, approved by Legislative Royal Decree 3/2001.

10.2.5 *The legal protection in place for the natural or legal person subject to screening and/or monitoring*

**10.2.5.1 Personal data protection in Spain**

Article 20 of the Spanish Constitution regulates freedom of information.<sup>76</sup> Article 105 of the Spanish Constitution furthermore dictates the right to access archives and administrative registers,<sup>77</sup> provided such access does not affect national security and defence, the investigation of crimes and a person's right to privacy.

As the Supreme Court states in Ruling 312/2012, 7 May, Civil Court, 1<sup>st</sup> section, this precept:

refers specifically to the legal configuration in the exercise of the right to access archives and administrative registers, as a non-fundamental right, not related to political participation, with the freedom of information and the right to effective judicial protection.

Article 18 paragraph 4 of the Spanish Constitution<sup>78</sup> recognizes the right to personal data protection. This encompasses the protection of rights and powers so that a citizen can know of the existence and purpose of, and the persons responsible for, the automated archive. The personal data that is included in the archive must be necessary with a view to the interests protected by Article 18 of the Spanish Constitution, with the fundamental right to privacy being given real and effective protection.

Said powers and rights are part of the right to privacy, which is directly binding on public administration. The protection of personal data is regulated in Organic Law 15/1999, 13 December, of Protection of Data of Personal Characteristics<sup>79</sup> (LOPD), and by Royal Decree 1720/2007, of 21 December, Regulation of the development of said Law (RLOPD).<sup>80</sup> The LOPD establishes an extensive and inclusive concept of personal data; it does not establish different ranges or types of data. Instead, it defines personal data as any data referring to natural persons who are identified or identifiable. It further identifies the media in which this personal data can be recorded. Even though it does not define specific

76 Article 20 paragraph 1: 'the following rights are recognized and protected... d) the right to freely communicate or receive accurate information by any means of dissemination whatsoever....'

77 Article 105: 'The law shall regulate:

- a. the hearing of citizens directly, or through the organisations and associations recognized by law, in the process of drawing up the administrative provisions which affect them;
- b. the access of citizens to administrative files and records, except as they may concern the security and defence of the State, the investigation of crimes and the privacy of individuals....'

78 'The law shall limit the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.'

79 Law 15/1999, 13 December, on Protection of Data of Personal Characteristics. BOE-A-1999-23750.

80 Royal Decree 1720/2007, of 21 December, Regulation of the development of said Law. BOE-A-2008-979.



types of data which necessarily fall under the regime of data protection, several articles do establish types of data that need special protection. Any data about an identified or identifiable person is in any case considered personal data under the terms of the LOPD and as such should enjoy its full protection.

The aforementioned legislative rules consequently see to it that the personal data contained in administrative and other files or administrative data support systems is protected by the LOPD. Access to said files can thus be considered the disclosure of personal data in Spain, especially if third-party data is involved. Under the LOPD, this would be considered a communication of data, which is subject to the protective system established in the LOPD. Article 11 LOPD determines that personal data can only be communicated to third parties with the previous consent of the person concerned. However, Article 11 LOPD identifies exceptions to the rule of consent. For the purposes of this country report, this is the case when 'a law allows for disclosure.' When public administration intervenes by collecting information on citizens, the legislation governing access to documents and files in its possession and archives is Law 30/1992, 26 November of Judicial Regime and the Common Administrative Process (LRJPAC).<sup>81</sup> Article 35 and 37 of the LRJPAC regulate the right of citizens to access administrative archives and registries and request procedural documents.

Article 35:

Citizens, in their relations with public authorities, have the following rights: to know, at any given time, the status of the procedures as interested parties, and to obtain copies of documents involved in them...

Article 37:

Citizens have the right to access public information, files and records under the terms and conditions set out in the Constitution and in the Law of transparency, public access to information and good governance, and other laws that may apply.

Articles 35 and 37 of the LRJPAC differentiate between administrative documents and two types of data. The differences are significant because they propose different means of accessing them, influenced by diverse factors such as the status of the file in an administrative process and the type of personal data collected by the administration.

As such, if a citizen requests access to documents that are a part of a procedure that is closed at the time of the request, the following two situations may arise:

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81 Law 30/1992, 26 November of Judicial Regime and the Common Administrative Process. BOE-A-1992-26318.

- The documents contain data which affects a person's right to privacy, in which case they will only be accessible to the person to whom the data belongs. This is separate from accessing information included in the CAP. In this situation, all information is considered personal information, while the information contained in the CAP encompasses only judicial information.
- The data present in the documents is 'nominative' in nature, but there is no data affecting a person's privacy, in which case access is permitted by the data holders, as well as third parties that can show that they have a legitimate and direct interest whereby they can use the contents to exercise their rights.

We see, then, that the general rule is that parties have the right to access files and documents held by administrative bodies, and that denial or rejection of access is the exception, where motivated and requested for reasons of public interest, in the interests of third parties in need of protection, or when mandated by law.

Furthermore, if a citizen requests access to the documents of an open or pending file, access may be permitted if the citizen is an 'interested party' in the file.

Moreover, in accordance with Article 11 LOPD, the regulations allowing for the transfer of data must be applied. Authorization to access the files on proceedings and administrative archives is granted by the LRJPAC. In doing so, it takes the distinction between types of personal data and other circumstances into account, which requires a case-by-case analysis. Even when an authorization has been issued to access data, the principles and obligations of the LOPD must still be taken into account.

Last, the LOPD grants all owners of personal data 'ARCO' rights (*Acceso, Rectificación, Cancelación y Oposición*). This involves the right to access, modify, cancel and oppose. Particularly when a law allows the disclosure of personal data without the owner's consent, the right to oppose is regulated in Article 6 paragraph 4 of the LOPD and 34 of its implementation by-law. These entitle any person affected to oppose the request to process personal data as well as the option of cancelling processing when consent to treat data is not required for legitimate and grounded reasons.

Public administrators are therefore obliged to inform the owner of the personal data of any application to access that person's documents at the time of the request so that he or she can oppose this request. This includes a request from another body in the Spanish public administrative system.

#### **10.2.5.2 Other rights**

The main duty of the person who is being inspected is to provide information and facilitate verification in accordance with the principles of proportionality and consistency. Article 39 of Law 30/1992 requires citizens to provide the administration with reports and to cooperate in inspections and other investigative acts only in the cases provided for in the

Act. If a citizen fails to do so, he has committed an administrative offence under Article 129 of this Law. Such failure can be established by means of inspections by the administrative authority. In compliance with the principles governing inspections, the inspection subject has the following rights:

- the right of intervention, presence and representation in administrative oversight. However, the inspection may take place in the absence of the inspection subject when required in the interests of the inspection;
- the right to be informed about the rules, content and purpose of gathering evidence (Article 35g of Law 30/1992);
- the right to be treated with respect, deference, courtesy and consideration (Article 35i of Law 30/1992);
- the right to demand identification and accreditation of the inspectors (Article 35b of Law 30/1992).
- the right to present arguments and documentary evidence (Article 35e of Law 30/1992).

### 10.3 INSTRUMENTS DIRECTED AT PREVENTING THE DISTURBANCE OF PUBLIC ORDER

#### 10.3.1 *Spatial planning*

The revocation of licences or administrative authorizations following a review is regulated in Law 30/1992. The review is based on Article 302 of Royal Legislative Decree 1/1992 of 26 June, approving the revised text of the Law on Land and Urban Scheme:<sup>82</sup>

Local authorities will conduct an official review of their actions and agreements in urban planning in accordance with Articles 109 and following the Code of Administrative Procedure.

The review process, as related in Article 302 paragraph 4 of Law 30/1992, makes it possible ‘to declare invalid a provision or act; in the same resolution, allowances for the appropriate stakeholders may be recognized.’

The review process can be initiated by the administrative authority that has granted the licence, or it can be started on request. There are several grounds on which the competent administration can revoke a licence following review.

<sup>82</sup> Royal Legislative Decree 1/1992 of 26 June, approving the revised text of the Law on Land and Urban Scheme. BOE-A-1992-15285.

First, a licence may have been granted in error. If so, it can be revoked, with a financial reimbursement for the person who was granted the licence by mistake. However, if the mistake can be attributed to that person, no reimbursement will be paid.

Second, there may be 'opportunity' reasons for revoking a licence. This is regulated by Article 42 of Law 6/1998 related to the soil and zoning.<sup>83</sup> If a new spatial planning programme has been approved regarding the use of the soil and/or zoning in the municipality, the authorities can revoke a licence and reimburse the licence holder. For instance, a nightclub has to close because of a change in the spatial plan, with the area being rezoned as a residential district subject to noise restrictions.

The third reason includes a change in policy or if the conditions of the licence have not been met. This reason can only be given in rare cases, due to the regulated nature of such activities. With the current deregulation of licences in Spain in the wake of the economic crisis, examples are few and far between. One instance is when a sanitation business has its licence revoked because of a change in the municipality's environmental policies (by promoting recycling for instance) or in cases where certain licences are linked with social or environmental policies. For example, in the city of Ourense,<sup>84</sup> the municipality offers pub licences inside public swimming pools, but the applicant must hire a certain percentage of mentally challenged people as employees. If the owner does not, the licence is revoked.

Last, a licence can be revoked if the licence holder has seriously infringed an urban regulation. In this case there is no entitlement to reimbursement and the infringement can also lead to sanctions. An example is the following: restaurants in Spain must have a smoke extractor, as well meet as other safety requirements, in their kitchens. If they ignore these requirements, their restaurant licence will be revoked immediately.

### 10.3.2 *Inspection*

#### 10.3.2.1 **The proceeding principles**

The power of inspection in public administration is a regular administrative activity in which the authorities intervene in order to determine the compliance of a particular activity with the legal system.<sup>85</sup> In the Spanish legal system, 'inspection' is defined as 'a set of coercive measures used by management to force individuals to adjust their activity to for the benefit of the public good.'

An inspection serves to determine whether a given activity complies with the legal system. The principle of prevention is a general principle for this type of administrative

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<sup>83</sup> Law 6/1998 related to the soil and zoning, of 13 April. BOE-A-1998-8788.

<sup>84</sup> In the Autonomous Community of Galicia.

<sup>85</sup> The Central State, the Autonomous Community or the Municipality.

intervention. The prevention measures are closely linked to the administrative duty to inform, with all interested individuals having access to all information related to obtaining licences, their obligations and fines for infringements.

In an 'administrative procedure', the authorities prescribe a series of acts to be carried out by citizens, with the legal effects being linked together to produce an administrative decision. The inspection authorities dictate the acts but are not entitled to halt proceedings (Article 89 paragraph 1 of Law 30/1992).

The Spanish Constitutional Court has stated that inspection serves to investigate and document the results of an enquiry, as evidence for imposing a subsequent penalty or even – if there are grounds – for criminal prosecution. During the inspection, the person being inspected must know the purpose of the inspection. Moreover, the authorities must notify the person being inspected of the inspection, under the terms of Law 30/1992.

Administrative activity must be based on a set of principles. These are crystallized in legal doctrine as:

- i. the principle of legality, according to which the inspection should be given adequate legal coverage;
- ii. the principle of objectivity, to ensure the fairness of the administration's staff;
- iii. the principles of efficiency and speed, according to Article 103 of the Spanish Constitution and Supreme Court Decision 178/1989 of 2 November. Efficiency is a fundamental principle of inspection, not only so as to avoid prescribing offences, but also with regard to the expiration of the legal activity;
- iv. the principles of consistency and proportionality. As an administrative intervention, inspection must always seek the least burdensome alternatives. Article 552 of the Criminal Procedure Act states that '...useless inspections of records should be avoided, with care being taken not to harm or bother the interested parties more than necessary, and with every kind of precaution being taken to avoid compromising their reputation and to respect their secrets'

In accordance with the above principles, the administrative authorities must seek 'minimal intervention', i.e. without disrupting the lives and issues of those being managed. Therefore, the inspection will be performed:

- at convenient times;
  - with limits place on the time spent on inspection;
  - and while respecting the right of interested parties not to submit documents other than the ones required by law.
- v. the principles of transparency and secrecy in the inspection activity. Those interested in knowing the contents of the file to be compiled by the administrative authorities

must be guided by the provisions of Article 84 paragraph 1 of Law 30 /1992, which provides for the interested parties to be heard, concerning:

Instructed procedures, and immediately before writing the draft resolution, will be apparent to those concerned or, where appropriate, their representatives, except when affecting the information and data referred to in Article 37 paragraph 5.

Thus, whenever administrative proceedings are held, the persons concerned are entitled to be heard by the same entity that will issue a decision on the matter (whether or not that is a sanction), within the limitations imposed in Section 37 paragraph 5 of the Law:

b. Access by citizens to administrative files and records, except for those affecting the security and defence of the State, the investigation of crimes and the privacy of individuals.

Access is also limited by the restrictive provisions of Article 105 of Law 30/1992 regarding the 'ending on the date of application procedures' and 37 paragraph 2 of Law 30/1992, which states that 'access to documents containing information relating to the privacy of individuals shall be reserved for them.' Article 37 paragraph 3 of Law 30/1992 allows access to registered documents whose owners have made no reference to privacy and by 'third parties having a direct and legitimate interest.' Last, Article 37 paragraph 5 under d excludes access to records 'relating to materials protected by industrial or commercial secrecy.' This is important in preventing access to documentation covered by intellectual property law.

#### **10.3.2.2 Spanish administrative procedure**

An administrative monitoring procedure can be initiated for two reasons, namely a) during the course of a regular inspection and b) when a complaint has been submitted by a private party.

The aim of this procedure is to obtain knowledge of the actual facts underpinning the administrative action in order to better comply with its public purpose. During the procedure, the authorities analyse all situations, statements, facts or activities which, directly or indirectly, are relevant to the public interest. The most common measures, which are executed by administrative police, are public registration, inventories, and the evaluation of the communication between the population and administrators.

The most common monitoring activity is the inspection itself, in which public servants, while respecting the rights of those being inspected and adhering to the principles noted in the previous paragraph, inspect all aspects subject to public monitoring, either technical or documentary, and required to operate a certain regulated activity, i.e. a licence.

Expropriation of premises is regulated in Article 33 paragraph 3 of the Spanish Constitution and the Law of 16 December 1954, on expropriation. It consists of the guided administrative transfer of private property from the rightful owner to the state. For this to happen, there must be a public, legal and constitutionally considered interest of public necessity or interest. Once private property has reverted to the state, the previous owner must receive financial compensation. If the public benefit of state ownership disappears or is otherwise covered, the expropriated property can be returned to its former owner. In Spain there is no preventive expropriation. There is no policy of using expropriation to combat organized crime, and we will therefore not elaborate on it further.

#### 10.4 SEIZING OF ASSETS

As in most issues in the fight against organized crime, the Spanish system uses mostly traditional law enforcement measures, stemming from criminal law, instead of administrative law. This is also the case for the seizing of assets.

However, as Ros states:

For many years the notion of seizing assets as found in the Penal Code has been relegated to the background, as a natural and final consequence of a judgment and has not been addressed as a mean of developing a specific criminal policy. Seizure was therefore traditionally a 'secondary' criminal penalty, but in recent years a new perspective has emerged concerning its use – by itself – as a mechanism to combat crime.<sup>86</sup>

Below we provide a modest overview of current legislation on the seizing of assets in Spain, in order to highlight the potential of the instruments.

The seizure of assets is regulated in Article 127 of the Spanish Criminal Code of 2010.<sup>87</sup> Article 374 of the Code determines the procedure relating to the seizure of assets.

The fight against drug trafficking gave rise to normative developments regarding the seizure of assets. Organic Law 1/1988 amended the Spanish Criminal Code.<sup>88</sup> More recently,

<sup>86</sup> Fernández Ros 2011.

<sup>87</sup> Organic Law 10/1995, of 23 November, Criminal Code. BOE-A-1995-25444.

<sup>88</sup> The recent reform of the Spanish Criminal Code has been inspired by the Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of proceeds, instrumentalities and property-related crime. The content of the Framework Decision 2006/783/JAI of the Council of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders is also relevant. Incorporation into Spanish law was effected by Law 3/2010 of 10 March, Modifying the Organic Law of Judiciary Power and complementary to Law 4/2010 of 10 March for implementation in the European Union of judicial confiscation.

the (amended) Criminal Code of 2010 established the basis for seizing assets in Article 127. Article 127 paragraph 1, first sentence, of the Spanish Criminal Code states:

All penalties imposed for a malicious felony or misdemeanour shall lead to loss of the assets obtained therefrom and of the goods, means or instruments with which they were prepared or executed, as well as the gains obtained from the felony or misdemeanour, whatever the transformations these may have undergone. All shall be seized, unless they belong to a third party in good faith who is not responsible for the felony, who has acquired them legally...<sup>89</sup>

Paragraph 3 of Article 127 (in conjunction with Article 374 paragraph 1 under 4 and 5 of the Spanish Criminal Code) provides that if the assets meant in paragraph 1 cannot be seized, the assets of the person in question which have an equivalent value and which pertain (legally) to those criminally accountable for the act shall be seized. Paragraph 4 provides for preventive seizure:

[...] the Judge or Court of Law may order the seizure foreseen in the preceding Sections of this Article even when no punishment is imposed on any person due [to] exemption from criminal accountability or due to the statute of limitations, in the latter case, as long as the unlawful status of the assets is proven.<sup>90</sup>

Paragraph 5 regulates the sale and/or destruction of confiscated property.

The aim of Article 127 of the Spanish Criminal Code is clearly punitive, as it seeks to seize ‘...from those responsible for the crimes both the instruments used to commit the crime and the assets obtained with the same.’<sup>91</sup>

This punitive character was further highlighted by Judge Congil of the Court of Cantabria: ‘the notion of “confiscation” in our criminal justice system has played a secondary role and is always subordinate to the penalty.’<sup>92</sup>

Article 374 regulates special rules regarding the seizure of assets under Article 127. Relevant for this country report is paragraph 1 under 2, which allows for the assets ordered by the relevant judicial authority to be held in deposit. Moreover, paragraph 2 stipulates the conditions for disposing of seized goods and assets (e.g. hazardous materials).

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89 English translation of the Spanish Criminal Code by the Spanish Ministry of Justice via: [http://www.sanchezcervera-abogados.com/en/files/2012/06/Criminal\\_Code\\_Código\\_Penal.pdf](http://www.sanchezcervera-abogados.com/en/files/2012/06/Criminal_Code_Código_Penal.pdf).

90 English translation of the Spanish Criminal Code by the Spanish Ministry of Justice via: [http://www.sanchezcervera-abogados.com/en/files/2012/06/Criminal\\_Code\\_Código\\_Penal.pdf](http://www.sanchezcervera-abogados.com/en/files/2012/06/Criminal_Code_Código_Penal.pdf).

91 Quintero Olivares 2010, p. 76.

92 Congil 2011, p. 112.



As mentioned at the beginning of this paragraph, the seizing of assets falls within the scope of criminal law. Therefore, this subject will not be explored further here.

## 10.5 OTHER RELEVANT MEASURES IN SPAIN

### 10.5.1 Money Laundering Prevention

Spain has a long tradition of fighting money laundering. Its proximity to Gibraltar, a well-known tax haven, and the fact that many Eastern European gangs have decided to focus their operations in Spain<sup>93</sup> have made police and administrative authorities prioritize this particular crime.

There are many examples of law enforcement actions aimed at combating money laundering. One of the best is *Operación Ballena Blanca*.<sup>94</sup> In this case, a money laundering network was discovered in which several law firms and notaries were involved in laundering EUR 250 million through subsidiary offices in Gibraltar, the Isle of Man and other tax havens. The laundered money came from criminal groups that made their money by – among others things – kidnapping, drug trafficking, arms trafficking and prostitution and laundered it by investing heavily in real property in the Costa del Sol.<sup>95</sup>

Money laundering is an offence, regulated in Articles 301 and 302 of the Spanish Criminal Code. In general, money laundering is divided into three different phases:

1. placement. This involves placing the money from illegal activities into the ordinary course of trade either by buying winning lottery tickets, swapping houses or by running a public business;
2. layering. This encompasses moving capital raised by illegal means to try and mask its illegal origin;
3. integration of funds into the legal market. This involves using legitimate companies that handle large amounts of cash, such as casinos or restaurants, by buying up closed or bankrupt companies or by investing in property through interceding companies.

In legal terms, the fight against money laundering in Spain is based (for the purposes of this report) on Law 19/1993 on certain measures to prevent money laundering. This law implemented Directive 91/308/EEC. Law 10/2010 on prevention of money laundering and terrorist financing supplemented the 1993 legislation.<sup>96</sup>

93 La Razón: [http://www.larazon.es/detalle\\_hemeroteca/noticias/LA\\_RAZON\\_444269/3622-mas-de-650-grupos-criminales-organizados-operan-en-espana](http://www.larazon.es/detalle_hemeroteca/noticias/LA_RAZON_444269/3622-mas-de-650-grupos-criminales-organizados-operan-en-espana).

94 'Operation White Whale' in English.

95 El País: [http://elpais.com/elpais/2011/03/31/actualidad/1301559423\\_850215.html](http://elpais.com/elpais/2011/03/31/actualidad/1301559423_850215.html).

96 Law 10/2010, of April 28<sup>th</sup>, on prevention of money laundering and terrorist financing. BOE-A-2010-6737.

Law 19/1993 sets the basic requirements for combatting money laundering. Article 2 determines the scope of 'bound subjects'. These are entities obliged to notify the authorities if they notice any suspicious activity. They include:

- credit institutions;
- insurance companies authorized to sell life insurance and insurance brokers who deal with life insurance and other investment-related services;
- investment services companies;
- the management companies of collective investment institutions and investment companies whose management is not assigned to a management company;
- the managing body of pension funds;
- the management companies of venture private equity and venture capital companies whose management is not assigned to a management company;
- mutual guarantee companies;
- payment institutions and electronic money institutions;
- people who conduct exchange business professionally;
- postal services in respect of activities of spin transfer;
- persons professionally engaged in brokering loans or credits;
- developers and those who run a real property business professionally, by means of agency, commission or brokerage;
- auditors, external accountants and tax advisers;
- notaries and property, commercial or real property registrars;
- lawyers, attorneys or other independent professionals who participate in designing, implementing or advising on transactions for clients concerning the sale of real property or business entities, managing money, securities or other assets, opening or maintaining checking or savings accounts, organizing contributions necessary for the creation, operation or management of companies or the creation, operation or management of trusts, companies or similar structures; or acting on behalf of clients in any financial or real property transaction;
- people who act on a professional basis and in accordance with the specific regulations applicable in each case to provide the following services to third parties: forming companies or other legal persons; acting in the function of a director or secretary of a company, a partner in a partnership or similar functions in relation to other legal entities or arranging for another person to act as such; providing a registered office or business address, administrative and related services for a company, association or any other instrument or legal person; exercising the function of trustee in a trust express or similar legal instruments or arranging for another person to act as such; performing the function of shareholder for a person other than a company listed on a regulated market that is subject to disclosure requirements consistent with Community law or equivalent international standards, or arranging for another person to act as such;

- casinos;
- people who deal professionally with jewels, precious stones or metals;
- people who deal professionally with art objects and antiques;
- persons professionally engaged in the activities referred to in Article 1 of Law 43/2007 of 13 December on the protection of consumers in the procurement of sale goods to offer to refund the money;
- people who provide business deposit, custody or professional cash transport or means of payment services;
- those responsible for the management, operation and marketing of lotteries or other gambling operations regarding payment of prizes;
- individuals performing movements of means of payment;
- persons who trade goods professionally;
- foundations and associations;
- managers of payment systems and systems for the clearing and settlement of securities and financial derivatives, as well as managers of credit cards or debit cards issued by other entities.

It does not matter whether the bound subject is domestic or foreign, as the legislation also applies to ‘persons or entities not resident, through agents or branches or by providing services without a permanent establishment in Spain to develop activities of the same nature.’

The system assumes the obligation to identify the people with whom they are going to carry out their activity and prohibits operations involving natural or legal persons who/that have not been properly identified. The activity is also subject to prohibitions if its purpose has not been identified.<sup>97</sup>

The aforementioned bound subjects are obliged to notify the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (SEPBLAC)<sup>98</sup> of any operations that are suspicious or in which the risk of money laundering exists. SEPBLAC is part of the Spanish Ministry of Economic Affairs. Notification to SEPBLAC is mandatory in the case of capital movements of € 3000 nationally or € 30,000 internationally.

The regulations discussed above implemented the recommendations of the Basel Committee on Banking Supervision<sup>99</sup> as well existing European Union legislation. These measures have been effective in the fight against money laundering and the financing of

97 Understood as any money- or currency-related operation that they come across in their duties.

98 Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias.

99 Basel Committee on Banking Supervision, via: <http://www.bis.org/bcbis/>.

organized crime. However, Spain continues to be one of the main destinations for money laundering in the European Union, especially since the start of the economic crisis.<sup>100</sup>

#### 10.5.2 *The case of EuroVegas*

EuroVegas was a project by casino magnate Sheldon Adelson. Adelson decided to situate his project in Spain, due to the location and the influx of tourism. He ultimately settled on Alcorcón, a city located about 30 km south of Madrid.

The project was problematic from the outset due to the risk of its attracting organized crime to the region. Furthermore, it would create a ‘judicial bubble’ in which laws relating to gambling, immigration, and the regulation of smoking and alcohol would not apply, as Sheldon’s business group had demanded a series of legislative changes at both the state and regional levels. Adelson required the following before he would commence the EuroVegas project:<sup>101</sup>

- i. two years’ exemption from paying social security contributions for EuroVegas employees;
- ii. two years’ exemption from municipal, regional and state taxes;
- iii. tax benefits on land and property for ten years;
- iv. state guarantee of a loan of EUR 25 million, which would basically be issued by the European Investment Bank;
- v. transfer of all public land needed, including expropriations, with the relocation of public housing, if any. Exclusive use of land for a ten-year period;
- vi. no collective agreements for EuroVegas staff by amending the Workers’ Statute;
- vii. legal privileges for hiring foreign staff, including fast-tracking the granting of work permits;
- viii. changes in legislation on the prevention of money laundering, with flexible controls;
- ix. authorization to permit minors to enter the casinos;
- x. elimination of the smoking ban in the casinos;
- xi. authorization to permit gamblers legally recognized as such to enter the casinos;
- xii. construction of infrastructure on request, or additions to existing infrastructure.

An article in *Cinco Días*<sup>102</sup> reported on the legislative changes induced by the project:

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100 RTVE: <http://www.rtve.es/alcarta/videos/telediario/espana-primer-pais-europa-blanqueo-dinero/1741956/>.

101 Preferente.com. ‘Las doce exigencias de Euorovegas para desembarcar en Madrid o Barcelona.’ Via: <http://www.preferente.com/noticias-turismo-destinos/las-12-exigencias-de-eurovegas-para-desembarcar-en-madrid-o-barcelona-208380.html>.

102 Cinco Días: ‘Las leyes que cambió Madrid para cumplir las condiciones de Eurovegas’, [www.cinco dias.com/cinco dias/2013/12/13/.../1386937762\\_118969.html](http://www.cinco dias.com/cinco dias/2013/12/13/.../1386937762_118969.html).

The Madrid Government approved a 'broom law' called the Fiscal and Administrative Measures Law, which creates the notion of the Integrated Development Centre (macro-casinos), i.e. a 'privately developed complex of considerable dimensions, aimed at providing integrated activities of a very diverse nature (industrial, tourist, conventions and conferences, entertainment, gaming, cultural, commercial, health), with the law accepting that these centres pose new and unknown situations in gaming that must be addressed.

The adoption of the Law of Fiscal and Administrative Measures also reduced the tax base of the casinos – previously the 'gross revenues of casinos from gaming or the amounts that players spend to participate in games' – because, according to the new rule, 'the amount spent on prizes' could be deducted.

In addition, the applicable tax rate was lowered. Prior tax rates of 55% were based on casino revenues of up to EUR 4.4 million. Now, the tax rate would remain at 10%. A number of tax bonuses were also added, for example in property tax and Economic Activities tax.

Moreover, the Law of Fiscal and Administrative Measures would apply a bonus for creating and maintaining employment and a 95% rebate on the share of transactions subject to transfer tax. An annual bonus of 9% was added for investments regarding the purchase of material.

The Heritage Act of the Community of Madrid, passed in June 2013, stated that 'the period during which no authorizations would be issued' for the establishment of new casinos in Madrid 'would be 10 years to meet the monopoly requirement of EuroVegas.' Also, the Heritage Act eliminated preventive archaeology projects before the start of construction.

However, in December 2013 Mr Adelson's business group publicly announced they would not pursue the project, as not all of their conditions had been met.

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## 11 THE ADMINISTRATIVE APPROACH IN SWEDEN

*L. Korsell & M. Norlin*

### PREFACE

If an establishment is to have “full rights” printed on its menu while remaining within the boundaries of the law, the restaurateur must have a permit to serve alcoholic beverages. After inspection of the Swedish Criminal Records and Records of Suspected Persons, individuals perceived as unreliable are denied such a permit. If, on inspection, it is revealed that a granted permit has been mismanaged, it can be revoked.

When the public sector procures goods and services, a number of requirements are imposed on the suppliers. A supplier may be excluded from the procurement if company representatives have committed crimes in the course of business activities.

These two examples illustrate how the legislature, through applying administrative law rather than criminal law, attempts to discourage criminals from exploiting legal companies. Such “administrative measures” constitute a strategy that is discussed increasingly in Europe. In Sweden there is also increased interest in using methods outside the field of criminal law to approach a problem formulated in the Industry Report in the following way almost twenty years ago.<sup>1</sup>

The serious businesses and society must protect themselves against crime, which takes considerable resources and impairs the efficiency of the national economy. The most serious threat to the free conditions under which trade and industry operate is perhaps that economic and organised criminality exploits and abuses the free and legal systems that apply to entrepreneurial activity.

In Sweden, however, there is no coherent strategy in terms of legislature to combat economic and organised crime with the help of administrative measures. The authorities instead apply the regulatory controls that have evolved through the years; after all, there are no less than 230 different laws regulating supervision. More than 90 government agencies (including the county administrative boards) as well as the country’s 290 municipalities have supervisory functions.<sup>2</sup> Looking only to the authorities’ supervision of activities, these figures illustrate that there is hardly a lack of administrative tools.

The purpose of this report is to provide an overview of the regulations that are deemed particularly significant to administratively combatting the type of criminality usually cat-

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1 SOU 1997:111, p. 523.

2 Govt. Com. 2009/10:79, p. 5.

egorised as economic and organised crime. Put another way, to create a system from an incoherent flora of regulations.

The overview of administrative measures constitutes a “Swedish Report” to the universities in Tilburg and Leuven for the ISEC study on the possibilities to exchange information between administrative bodies and traditional law enforcement organisations to apply administrative measures within EU MS and at the EU level.

## 11.1 INTRODUCTION

### 11.1.1 *Administrative measures – what are they?*

The various country reports to the Dutch research project on administrative measures are based on a common definition of the term. Administrative measures means combatting the facilitation of criminal activity by preventing criminals from using society’s “administrative infrastructure”.

1. This is achieved by performing inspections on companies and individuals (for example, through register checks, in some case in the Swedish Criminal Records and Records of Suspected Persons) prior to:

- a. authorities making decisions on permits, for example, to operate a taxi business or allowing a restaurant to serve alcohol,
- b. authorities disbursing aid or subsidies,
- c. authorities, municipalities and other parts of the public sector purchasing goods or services from private suppliers (public procurement).

These administrative measures function as a gatekeeper to stop criminals being released into the public systems and infrastructures.

2. The administrative measures also allow authorities to shut down operations, or take over buildings or premises, if they are being used in a disruptive or illegal manner. This can be seen as a physical way to prevent certain activities in comparison with licensing decisions.

3. Measures outside the criminal justice system aimed at re-appropriating criminal gains, such as sequestration, also tend to belong to the administrative area. In this point, there is thus an overlap between administrative measures (focusing on the administrative aspects) and the strategy that falls under the heading asset-oriented law enforcement (focusing on the money).

General requirements that make it harder to abuse the infrastructure can also be classified as a weak form of administrative measures, such as the size requirement for share capital.

### 11.1.2 *The Swedish development of administrative measures*

#### **Economic and organised crime**

Somewhat simplified, organised crime usually refers to a criminal operation which in itself is illegal, such as the distribution of drugs. The difference with economic crime is that the operations are legal but the crime takes place within the framework of the operations in disregard of the regulations that apply to entrepreneurial activity, such as construction companies hiring undocumented workers and not paying tax.

In practice, however, this distinction between illegal and legal operations is not as clear. For example, people with links to organised crime can use companies as regulation-abiding criminal tools for committing fraud and purchase tax evasion. In reality, these can then hardly be considered legal operations.

One characteristic of crime where companies are involved is the interfaces that exist with all of the legislation regulating various conditions within business activity as well as the range of administrative authorities that grant permits, exercise control and supervision, disburse subsidies or procure goods and services. Many of these interfaces are, in practice, administrative measures against economic and organised crime. However, this does not mean the concept of administrative measures is being used; that they fall under a common strategy and that regulatory control is synchronised to achieve maximum impact. A characteristic of the Swedish development of administrative measures is that there has never been any comprehensive approach taken, instead various measures have been applied at different points in time.

When economic and organised crime became a criminal-political issue in Sweden in the early 1970s, these forms of crime were regarded as being closely connected. A task force with representatives from the police, Swedish Prosecution Authority and Swedish Tax Agency highlighted the need to perform a legislative revision in order to combat economic and organised crime.<sup>3</sup> It was possibly then that the first ideas were formed on administrative measures having a larger and wider significance than individual reforms. The Government initiated an investigative line of inquiry and commissioned the Swedish National Council for Crime Prevention (Brå) to conduct a legislative revision.<sup>4</sup>

3 AMOB 1977; Lindgren 2000; Korsell & Larsson 2011.

4 Romander 2000; Korsell 2000.

### Controlling the controllers

Brå took a series of initiatives in the legislative areas where there was an evident need. Professional groups of relevance to the business community were also emphasised as being of interest for administrative measures. This includes auditors and lawyers. They exert a sort of indirect control over other activities in the business sector. Ethical rules for these professional groups were emphasised. The idea is also that high access requirements for establishing oneself in these professions, where the incidence of prior criminality is relevant, contributes to the professions maintaining ethical and moral standards within large parts of the business world. Stricter regulation of the activities of lawyers and auditors<sup>5</sup> As will be discussed in more detail later in the report, the controllers are now being controlled – lawyers, auditors and even real estate agents – through conduct requirements.

### Conduct assessment in critical industries

One administrative approach is to directly shine a spotlight on the industries that have problems with economic and organised crime. To keep criminals from establishing themselves as entrepreneurs in critical industries, there are basically two paths to take. One is to impose the requirement of a trade permit, where the aspiring entrepreneur's conduct is examined. Educational requirements and financial guarantees can also be included. Once the permit is granted, the business can be inspected and the permit can be revoked in the event of violation.

The second strategy is to eliminate conduct assessment and open the doors to entrepreneurship. Instead, control is exercised over existing businesses. If the business proprietor is found guilty of an offence within their business, the authorities can set different requirements that are followed up by control measures, obligations and penalties, which hinder further criminal activity and prevent continued entrepreneurial activity. In the case of serious crimes, the court can issue a ban on business activity.

The strategy involving trade permits for establishing oneself in critical industries was broached by a Government Report in the beginning of the 1980s, *Kommissionen mot ekonomisk brottslighet*.<sup>6</sup> One of the many proposals from the Commission against Economic Crime related to the requirement of trade permits to run a business in industries vulnerable to problems with economic crime.<sup>7</sup> This involved, for example, the restaurant, transportation, construction, automotive and cleaning industries.

Depending on the need, a trade permit could include different requirements: conduct, education or financial guarantees. The proposal regarding trade permits is reminiscent of

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5 Brå Memo 1978:2 and Brå Memo 1979:8.

6 Lindgren 2000.

7 SOU 1984:8.

the Dutch system where businesses and entrepreneurs are inspected before a permit is granted.

The Commission proposal regarding trade permits can be considered the clearest example in Sweden of an attempt at an administrative strategy, in that it not only looked to industry-specific measures but instead sought to introduce gatekeeper-type regulation judged to work in a range of industries.

However, trade permits were never introduced. The Government considered that the control measures would be both costly and not very efficient. “A comprehensive trade permit system was assessed as (potentially) inhibiting establishment to a greater extent than intended, as well as consuming significant resources considering that examination would also need to include serious business proprietors”.<sup>8</sup> A large number of the consultative bodies, including central government agencies and business associations, were critical of the Commission proposal for trade permit requirements.

The proposal, however, led to an amendment of the existing legislation regarding the serving of alcohol and the operation of commercial traffic, by way of an extended conduct assessment (which we will return to). As will be apparent in the survey presented later, conduct assessment has however been introduced in a number of activities, despite the Government’s aforementioned hesitant approach to the method. On the other hand, the Commission proposal regarding trade permits on a broad front in critical industries has never been realised.

In addition to trade permits and conduct assessment, the question of introducing some form of “proprietor’s license” has been discussed off and on. The requirement for such a permit would involve basic knowledge of business management, such as bookkeeping, costing and tax legislation. The perception, however, has been that such a requirement would have an excessive inhibitory effect on the willingness and ability to start businesses. In the Government Bill on corporate finance as well as information and advice aimed at businesses, it was not advocated that a proprietor’s license be introduced.<sup>9</sup> In the Swedish Business and Industry Committee processing of the Bill,<sup>10</sup> the motions that were not in line with the Bill were rejected, including a motion on the possibility of introducing a proprietor’s license in government administration.<sup>11</sup>

### **General crime prevention requirements**

It is primarily on the area of weak administrative measures – which in many cases can be very strong in practice – that various legislative revisions over the years have focused on the most. Some examples of such measures include capital requirements for limited liability

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<sup>8</sup> Bill 1985/86:126, p. 27.

<sup>9</sup> Bill 2009/10:148.

<sup>10</sup> Committee Report 2009/10: NU25.

<sup>11</sup> Motion 2009/10:N457.

companies, rules for liquidation of limited liability companies, the presence of auditors and their obligation to cooperate in criminal investigations or report the suspicion of crimes, and a series of reforms within the tax system such as the requirement of certified cash registers.

### **Asset-oriented law enforcement**

In an official letter to the Parliament in 1995, the Government presented a strategy against economic crime.<sup>12</sup> It led to an extensive reform, which is reminiscent of both the aforementioned revisions carried out by Brå, and also the Commission against Economic Crime.<sup>13</sup> One of many questions raised concerned the forfeiture of proceeds from crime.<sup>14</sup> “Focusing on the money” has gradually become an increasingly important issue for criminal policy. Asset-oriented law enforcement applies regulatory systems from the criminal process, civil law, administrative law as well as debt enforcement legislation. Parts of the asset-oriented law enforcement – sequestration and lien – may be considered to constitute administrative measures (developed later).

Money laundering also began to be regulated in the 1990s. The Finance Police was established within the National Bureau of Investigation, and serves as Sweden’s Financial Intelligence Unit for money laundering issues. A special Proceeds of Crime Unit has also been created within the Swedish Economic Crime Authority. At a much later date, the Swedish Social Insurance Agency gained a unit that focuses on organised crime and the allowances received by criminals.

### **Agency collaboration and information sharing**

Agency collaboration has been a common thread in the strategies against economic and organised crime. As early as in the 1970s, the Task Force on Organised Crime (AMOB) investigation had a clear agency-common profile. As more agencies become involved, the potential for developing administrative measures has increased, as police and prosecutors have opened their eyes to a perspective other than the purely criminal. During the 1990s, specific collaborative bodies were formed at the county level in order to facilitate cooperation. For example, the Police, Tax Agency, Enforcement Authority, emergency services and alcohol licensing and supervision authorities were able to jointly agree to inspect local restaurants based on the respective agency’s regulations and authority (“Operation Pub Cleansing”). Agency collaboration also occurs to prevent erroneous payments from the social security systems.<sup>15</sup>

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12 Govt. Com. 1994/95:217.

13 Korsell 2000.

14 SOU 1999:147.

15 Swedish Agency for Public Management Memo, Ref 2009/60-5.



In addition, agency collaboration requires the exchange of information, but the secrecy rules have always been perceived as an obstacle. Opportunities to facilitate the exchange of information, not least registry data, and to ease up on the secrecy rules have therefore been recurring issues for decades. In the area of welfare, the opportunities have increased to exchange electronic information between the disbursing authorities.<sup>16</sup> Among other things, a law has been introduced regarding the duty of notification<sup>17</sup> in the event of erroneous payments from the welfare system, which applies when there is reason to believe that a financial benefit from another authority has been wrongly awarded or disbursed in too high an amount (Section 3).<sup>18</sup> The degree of suspicion for a notification to be submitted is set deliberately low, as the idea is that this will allow the prevention of as many erroneous payments as possible. The law applies to grants, allowances and loans for personal purposes, which in accordance with law or ordinance are decided by the Migration Board, Swedish Social Insurance Agency, Swedish Pensions Agency, the Swedish Board for Study Support (CSN), the Swedish Employment Service, the municipalities or the unemployment insurance funds (Section 1).

### **Crime against the welfare systems**

Following the economic crisis of the early 1990s, the Government launched the project *Kontrollfunktionen i staten*.<sup>19</sup> The aim was to strengthen the control of how state funds were used but also how they were received by the State through taxes. Errors, fraud and overuse of different subsidies ended up as the central focus, as well as fiscal control. Many of the operations that were conducted are highly interesting from the perspective of administrative measures; sharing information between agencies, registry runs, control strategies and stricter control methods. For many agencies, the projects involved an awakening, especially for disbursing authorities where the control issues had thus far only had a minor role.

Neither was this initiative carried out under the umbrella of administrative measures. The focus was on the care of the state economic systems rather than on the insertion of the control function of the state in an operation directed against economic and organised crime. It was more a matter of administrative policy than criminal policy.

Around the same time as the Control Function of the State was conducted, more and more voices were raised among opinion-makers and politicians alleging that fraud involving different subsidies was being perpetrated against the welfare systems.<sup>20</sup> A special

16 SOU 2007:45; Bill 2007/08:160.

17 2008:206.

18 Also, see Bill 2007/08:48, p. 15.

19 Statskontoret 2002.

20 Korsell, Hagstedt & Skinnari 2008.

delegation was formed which instigated a number of initiatives to reduce the level of fraud.<sup>21</sup> Some of the delegation's key proposals to avoid erroneous payments included; increased collaboration between the agencies of welfare systems, access to more accurate and reliable information for the administrative authorities, more consistent concept formation (time, income and housing concepts) within the welfare systems' legislation, and stricter legislation for social benefits fraud. These resulted in the following investigative reports: *Bidragsspärr*,<sup>22</sup> *Sanktionsavgifter på trygghetsområdet*,<sup>23</sup> *Månadsuppgifter – snabbt och enkelt*<sup>24</sup> and *Harmoniserat inkomstbegrepp*.<sup>25</sup>

The Benefit blocking report suggested that a temporary exclusion from the welfare systems should be introduced for serious benefit fraud. The Monthly data and Harmonised income concept reports ordained that the requirement of *monthly data on salary at the individual level* be introduced. All employers would be included, and the disbursing agencies would gain direct access to the information. These reforms have so far led to very limited regulation.

As with the Control Function of the State, the emphasis was not on economic and organised crime but on reducing erroneous payments.

Nowadays, the leakage from the welfare system has gone from control issues in general and the "regular people" cheating, to being directed toward serious fraud, systematic crimes and criminals partially being supported by subsidies. Benefit crimes and fraud are therefore found under the headings of "mobilisation against organised crime" and "focusing on the money". In the context of asset-oriented law enforcement, administrative measures are applied (outside of criminal law), such as the reconsideration of subsidies, reclamation of erroneously disbursed amounts, and seizure of debts.

### Supervision and control

Supervision is a key feature of the Swedish system of administrative measures, whether or not it is a step to reinforcing conduct assessment. In the mid-1990s it was suggested that a general supervisory law be introduced with general rules for supervision of all areas.<sup>26</sup> The Government argued, however, that a general law risked being too general and that several supervisory areas needed specific rules. Instead of a new law, the Government issued guidelines on supervision in an official letter entitled "A clear, fair and effective supervision".<sup>27</sup>

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21 SOU 2008:74.

22 SOU 2008:100.

23 SOU 2011:3.

24 SOU 2011:40.

25 SOU 2012:47.

26 SOU 2004:100.

27 Govt. Com. 2009/10:79.

In the same letter, the Government stated that the municipalities should continue to be responsible for exercising supervision. The areas where the municipalities today have supervisory responsibility are those that are of the greatest importance in society. To ensure equality and public security, the State should, according to the Government, take clearer and increased responsibility for the governance of the municipal supervisory duties.

### **Public procurement**

For a long time, procurement issues have been important and referred to in different reports. The public sector is a major client of industries with problems of economic crime, such as the building and construction, cleaning and transportation industries.<sup>28</sup> Yet it is local rather than central initiatives that have been taken to ensure that no procurement takes place with irresponsible parties. Various contract solutions are applied with penalty clauses. Suppliers' seriousness is examined, as well as that of their subcontractors. Collaboration is underway with the Swedish Tax Agency to investigate for which people taxes are fees are paid. Access control is observed on construction sites.

## **11.2 FREE ENTERPRISE AND GENERAL PREVENTION RULES**

### *11.2.1 Free enterprise – the core of Swedish business*

A fundamental principle in Swedish law is that everyone has the right to engage in business activities. This free enterprise is constitutionally protected (Chapter 2, Section 17 of the Instrument of Government, RF). In the mid-1980s the Commission against Economic Crime expressed that we “in Sweden today, from an international perspective, have an almost unique freedom to establish businesses”, as the departure point from an international perspective is that there are more or less comprehensive systems for the establishment control of new entrepreneurs.<sup>29</sup> The Instrument of Government (RF) states that: “restrictions on the right to conduct business or practice a profession can only be imposed to protect essential public interests” (Chapter 2, Section 17 of the RF).<sup>30</sup> This prudent limitation of freedom of trade is in line with the understanding that well-functioning business legislation and free enterprise are vital for long-term corporate investment interest, and that these business conditions are crucial for determining in which countries future investments will be made.

<sup>28</sup> SOU 1997:111.

<sup>29</sup> SOU 1984:15, p. 200.

<sup>30</sup> Historically, free enterprise in modern times has been protected by the free trade regulation of 1864.

Considerations regarding human life, health, safety or privacy, or major economic values, have been considered exempt from the principle of free enterprise, but in some cases the risk of crime has also been deemed to justify restrictions. A ban on business activity is the most restrictive limitation. According to the Trading Prohibition Act,<sup>31</sup> the court can issue a ban on business if a person has “grossly neglected what was incumbent on him in the (previous) business and thereby become guilty of crimes not considered minor” (more on trading prohibition below).

### 11.2.2 *General requirements for engaging in business*

#### **Approval for corporate tax**

Even with a substantial degree of freedom of trade, there are of course some general requirements for those who intend to engage in business. In practice it is very difficult to run a business, in a tax context, without being subject to corporate tax regulations. To be approved for corporate tax means the right to be responsible for one’s own tax payments, make provisional tax deductions on employee salaries and be responsible for employer contributions for national insurance. It is the Swedish Tax Agency that decides whether a proprietor is covered by corporate tax.

Reasons not to approve an application for corporate tax, pursuant to Chapter 9, Section 1 of the Tax Procedure Act,<sup>32</sup> include examples such as a natural person not having reported or paid taxes or fees, not followed an injunction to submit an income tax return, having been subject to trading prohibition or declared bankrupt.

#### **Protection of capital in limited liability companies**

According to Section 2 of the Trade Register Act,<sup>33</sup> there are no financial requirements imposed on a party who wishes to register a sole proprietorship or a partnership, but to engage in business as a limited liability company requires, pursuant to Chapter 1, Section 5 of the Swedish Companies Act<sup>34</sup> a share capital of at least SEK 50,000. The purpose of this provision is to ensure an adequate protection of capital. In the preamble to the recent reform of the share capital requirement – where the requirement was halved from SEK 100,000 to SEK 50,000 – the need for a capital requirement was justified in the following way.<sup>35</sup>

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31 2014:836.

32 2011:1244.

33 1974:157.

34 2005:551.

35 Bill 2009/10:61, p. 5.

A fundamental feature of the limited company is that the shareholders are not personally responsible for the company's debts. The idea has been that, in order to balance this lack of personal payment liability, there must be rules about capital protection to ensure that the company always has assets that are at least equivalent to the company's obligations. The share capital is a fundamental element of capital protection and aims to ensure that there is a margin between the company's assets and liabilities.

The Government's aim with the reduction was to stimulate economic growth and employment. A lower capital requirement should mean more people will want to start a business and have the courage to do so.

The reform, however, seems to be somewhat restorative as, in 1973, the Parliament increased the minimum capital tenfold from SEK 5,000 (a minimum capital that had remained unchanged since 1895) to SEK 50,000.<sup>36</sup> In conjunction with limited liability companies being divided into two categories in 1995 (private and public), the Parliament decided once again to raise the limit for the minimum share capital for private limited companies from SEK 50,000 to SEK 100,000. The motivation was to strengthen the protection of creditors.

Despite the increase corresponding to a doubling of the capital requirement, the Companies Act Committee did not reach a consensus about the capital requirement; two members dissented, arguing for a quadrupling of the capital requirement.<sup>37</sup> They referred to the point that limited liability companies are often exploited for economic crime because the owners have no personal liability for the company's debts. High capital requirements would thus make it more difficult to abuse this corporate form for criminal purposes.

However, it is a delicate task to place the capital requirement at the right level; on the one hand, the protection of creditors should be ensured along with that the limited liability company as a business form is not abused in order to avoid personal payment liability, and on the other hand, it should not lead to the establishment threshold becoming too high for new entrepreneurs.

### 11.2.3 *Fiscal control, liquidation and auditors*

#### **Fiscal control**

In the actual taxation procedure, there are measures that aim to prevent the occurrence of, above all, economic crime. Key measures include the general and the (in some cases) specific *documentation requirements*, company law provisions regarding *compulsory liquidation* and the *mandatory audit requirement* for certain companies.

<sup>36</sup> Bill 1973:93.

<sup>37</sup> SOU 1992:83. See, *inter alia*, the motion 1993/94:L203.

### **Documentation requirements**

All proprietors are subject to a general documentation requirements under Chapter 39, Section 3 of the Tax Procedure Act. The documentation requirements aim to ensure that the disclosure obligation (referring, for example, to income statements, on-going book-keeping and accounting) established by the law is fulfilled, while enabling the Tax Agency's verification of this obligation. The Tax Agency's verification constitutes an administrative measure which is partly enabled by the documentation requirements.

A far-reaching control form is auditing, as the tax auditor's review powers are extensive. After the audit decision has been made (Chapter 41, Section 4 of the Tax Procedure Act), the auditor is entitled to review accounting material, inventory the cash register and inspect the business premises (Chapter 41, Section 7 of the Tax Procedure Act).

### **Staff ledger system**

To combat undeclared work within the restaurant, hairdressing and laundry industries, a thorough documentation requirement is stipulated. For these industries, there is an obligation to keep a "staff ledger, and document in this the necessary data for identification of the proprietor and continuously document the necessary data for identification of the persons working in the business" (Chapter 39, Section 11 of the Tax Procedure Act). The staff ledger facilitates the control of which people are working in the business, and therefore the individuals for whom the employer needs to deduct tax at source and pay employer contributions.<sup>38</sup> The Government is considering whether the requirement to keep a staff ledger should be extended to include additional (critical) industries, such as the construction industry.<sup>39</sup>

### **Requirement of cash registers**

For those industries involving the sale of goods or services for cash payment, a certified cash register must be used (Chapter 39, Section 4 of the Tax Procedure Act). The requirement of cash registers was introduced in order to protect serious entrepreneurs from unfair competition from less reputable entrepreneurs.<sup>40</sup> From 1 January 2014, the previous exemption from the cash register requirement for plaza and market trade has been abolished,<sup>41</sup> which is why the same requirements now also apply to this type of business.

### **Compulsory liquidation**

The rules on compulsory liquidation involve an obligation for the limited liability company to be dissolved when there is reason to believe that the company's equity is less than half

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<sup>38</sup> Ds 2009:43.

<sup>39</sup> Bill 2012/13:34.

<sup>40</sup> Bill 2012/13:129, p. 21.

<sup>41</sup> Bill 2012/13:129, bet.2012/13:SkU32.

of the registered share capital, or if the company lacks assets for full payment of a foreclosure claim (Chapter 25, Sections 13-16 of the Companies Act<sup>42</sup>, ABL).

Of particular interest from an administrative measures perspective, however, are the situations in which the Swedish Companies Registration Office decides on compulsory liquidation. It is actualised when the company has not submitted notification regarding the competent Board, CEO, special recipient of information or auditor, not submitted the annual financial report and auditor's report, and not reported if the share capital falls below the minimum level.

### **Mandatory audit requirement**

As noted in several reviews of the legislation against economic crime, the limited companies' auditors perform a central control function. Auditing aims:<sup>43</sup>

[...] to satisfy, inter alia, the shareholders', employees', creditors' and public's interests in there being appropriate control over a company's business being handled in a lawful and correct manner, and that the company's financial position and results are reported correctly.

Since 1999, auditors have had an obligation to alert the prosecutor if they suspect that financial crime has been committed by the CEO or a board member in the company (Chapter 9, Sections 42-44 of the Companies Act).

On 1 November 2010, a contextually relevant regulation amendment entered into force, which meant that the previously unconditional requirement that a limited company must have at least one auditor (Chapter 9, Section 1 of the Companies Act) was abolished. Only limited liability companies that meet more than one of the following conditions are, following the rule change, still required to have an auditor:

1. The average number of employees in the company during each of the past two financial years has been more than 3,
2. The company's reported balance sheet total for each of the past two financial years has amounted to more than SEK 1.5 million.
3. The company's reported net turnover for each of the past two financial years has amounted to more than SEK 3 million.

If the individual limited company meets only one (or none) of the above conditions, it is up to the company to decide whether or not it should have an auditor. The reform is an

42 2005:551.

43 Bill 2009/10:204, p. 56.

attempt to reduce the regulatory burden on small business; the Government estimated that the abolition of the mandatory audit covered about 250,000 companies.

The Government's view was that the EU Accounting Directives aimed at creating a "minimum common level of protection in the Member States for shareholders, creditors and other stakeholders," but that Sweden so far "had not taken advantage of the opportunity afforded by EU legislation for exemptions for small businesses".<sup>44</sup>

The partial abolition of the mandatory audit came as a relief to small business owners. The Swedish Tax Agency, however, felt that abolishing mandatory auditing would "result in an increase of both conscious and unconscious errors in company accounts and thus the number of tax return errors will increase."<sup>45</sup>

In its comments to the proposal, the Swedish Economic Crime Authority stated that the report<sup>46</sup> seemed to assume that the problems that might arise if companies choose not to have an auditor would be solved through prosecution and sanctions. Penal measures should not, however, be the primary tool to getting to grips with reckless or deliberate regulation breaches in business, according to the Swedish Economic Crime Authority, as crime prevention measures that provide a strong incentive for most companies to act properly would be a more effective and appealing approach. A prerequisite for effective law enforcement in the area of economic crime is properly functioning control systems, and it is here that auditors play an important role according to the Authority.<sup>47</sup>

According to Brå's consultation response, however, the functioning of the market should not be underestimated; the issue of preventing economic crime does not stand or fall with the mandatory audit requirement. Not least market actors in the form of creditors and suppliers are expected to make demands for control, and audit companies were expected to develop "voluntary" audit services that would suit a deregulated environment. Moreover, they were assessed by the bookkeeping agencies hired by the companies as having an "educative" effect on the businesses, thus ensuring the maintenance of high accounting standards. The conclusion of Brå on the other hand was that the result of a mandatory audit requirement abolition was too risky, which is why a more reliable basis than the report needed to be developed before a decision on the possible removal of the audit requirement was adopted.<sup>48</sup>

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<sup>44</sup> Bill 2009/10:204 p. 56.

<sup>45</sup> Swedish Tax Agency 2008.

<sup>46</sup> SOU 2008:32.

<sup>47</sup> Swedish Economic Crime Authority 2008, p. 2.

<sup>48</sup> Brå 2008.



### 11.3 BAN ON BUSINESS ACTIVITY

As mentioned earlier, a ban on business activity constitutes the harshest sanction a proprietor can be subject to, as the ban in principle means that the proprietor must cease all business activity for a certain period. If a person has grossly neglected what was incumbent on them in the business, and it is expedient in the eyes of public interest, a trading prohibition shall essentially always be issued in the event of crimes not considered minor.<sup>49</sup> A ban on business activity is, however, not formally an administrative measure. Nor should it be regarded as a penalty for a crime (punishment, etc.) but as a “special legal consequence” (Chapter 1 of the Swedish Penal Code, BrB). Prosecutors may, as a rule, bring an action for trading prohibition in connection with the prosecution of criminal offences (Section 8 of the Trading Prohibition Act).<sup>50</sup>

The reason why trading prohibition is nonetheless being dealt with in the context of administrative measures is that there is an interaction between the trading prohibition on the one hand, and on the other hand, permit, registration and notification requirements (and associated supervision). The legislature can (as a control strategy) choose between applying force at the establishment of a business (permit with subsequent supervision), during the operation of that business (supervision, sometimes in combination with notification), or when crimes have been committed within the business activities (trading prohibition). Permit, registration and notification requirements should reduce the need to issue a ban on business activity. The aforementioned administrative measures are aimed partly at reducing the risk of crime, and consequently at reducing the amount of situations where trading prohibition may be required.

The close connection between trading prohibition and permits with conduct assessment is clearly stated in the guidelines bill,<sup>51</sup> in which *Eko-kommissionen*’s (Economic Commission) proposal for a system with trade permits was discussed. In the bill it is argued that the proposed trade permit system and an expanded trading prohibition may be considered as alternative ways to take action against irresponsible proprietors, and therefore should be dealt with in that context.<sup>52</sup>

That the administrative measures are by far more important in preventing the abuse of free enterprise than the ability to issue a trading ban can be illustrated by some statistics. According to Statistics Sweden (SCB), there were no fewer than 1,051,257 active companies in Sweden in 2012. In March of the same year, only 1,047 decisions were made to issue

49 Bill 1995/96:98.

50 1986:436.

51 Bill 1984/85:32 p. 81.

52 See also JuU1984/85:28, p. 28.

trading bans,<sup>53</sup> which represents 0.1 per cent of the total number of active companies. However, the number of trading bans has increased significantly over the past decades.<sup>54</sup>

In addition to making it difficult for previously convicted persons to use companies as a crime instrument, the trading ban can also be used to discourage the use of dummies on company boards.<sup>55</sup> In limited liability companies, it is common for those planning to commit economic crime via a company to put in a “goalkeeper” as director of the company<sup>56</sup>. In a case before the Supreme Court,<sup>57</sup> the court found that in view of public interest, it was warranted to impose a five-year trading ban on a person who had acted as goalkeeper. He had, among other things, been a director in twelve limited companies, which had all gone bankrupt. The Supreme Court stated in its reasoning that the man had failed to fulfil his obligations as a company director in each of the limited companies, and that his negligence appeared very serious as he had been the sole director of these companies. The ruling ought to be significant for the use of board goalkeepers henceforth.

#### 11.4 PERMITS OR REGISTRATION TO ENGAGE IN BUSINESS ACTIVITIES

##### 11.4.1 *Conduct assessment with registry checks*

Although the main principle in Swedish law is free enterprise, there are a number of business-specific permits (“trade permits”). Consequently, these permits can also be revoked. The rules regarding permit obligation – and the possibility of revocation and other interventions – constitute clear examples, perhaps the most obvious, of administrative measures against economic and organised crime in Swedish legislation.

For industries where tax evasion and other forms of economic crime are a problem, it would seem logical with some form of examination of the applicant’s *conduct and suitability*. Section 5 deals with a number of industries and professions where conduct assessment takes place. In the absence of an accepted definition of the term *conduct assessment*, the definition found in the bill *Ökad tillsyn av den yrkesmässiga trafiken*<sup>58</sup> is used, and which

53 SOU 2012:84, p. 75.

54 Swedish Economic Crime Authority 2004:2.

55 Karlsson-Tuula 2005, p. 54.

56 Goalkeepers are people who do not intend to seriously participate in the company’s business, but merely lend their name to it in order to comply with the formal requirements of the Companies Act. Bulvanutredningen proposed the introduction of a provision with a specific competence requirement for board members and CEOs in limited companies, in order to curb the use of goalkeepers on company boards. See SOU 1998:47 p. 70 ff. The Government, however, felt that the proposed provision was too vague and imprecise in design, and therefore rejected the inclusion of such a provision. See Bill 2000/01:150 p. 77 f.

57 Ö 2549:03.

58 Bill 1993/94:168, SOU 1999:60.

has later been expressed in Section 5 of the Act concerning taxi traffic.<sup>59</sup> Conduct assessment means an examination of the person applying for a specific trade permit (in this case a taxi permit), which means that a permit/license 'may only be given to a person who, with respect to *professional skills, economic conditions* and *good reputation*, is deemed suitable to conduct the business.'<sup>60</sup>

In the case of thorough conduct assessments, the licensing authorities perform a registry check in the Police's Criminal Records and Records of Suspected Persons in order to get a picture of whether the applicant has any criminal record. The importance of this registry data when considering permit applications depends on the type of crime, when it took place and the industry-specific legislation's protective purpose. The Swedish National Police Board is responsible for both registries, which have partially overlapping purposes.

The Criminal Records Registry contains information such as judgments and summary impositions of fines (Section 3 of the Act on criminal records<sup>61</sup>). The Criminal Records Registry are maintained primarily for the criminal justice system (for example, for use at sentencing), but also for other agencies' diverse needs. As regards administrative measures, one purpose of these records is of particular interest, namely that they are kept for such 'suitability assessment, permit consideration or other examination as are prescribed by statute' (Section 2).

The Records of Suspected Persons, however, contain information on those who are suspected of a crime on good grounds (Section 1 of the Suspicion Registers Act<sup>62</sup>). Part of the objective with this registry is to be able to use the information for conduct assessment.

Information contained in Police records is covered by professional secrecy legislation. In the case of the Criminal Records Registry, information may only be accessed by agencies that have a statute-regulated right to do so. The Criminal Records Registry has a division between authorities that are entitled to receive full information from the registry, and authorities that have the right to obtain information about certain offences (Sections 10-17 of the Criminal Records Registry Ordinance<sup>63</sup>). A similar division is found for the Records of Suspected Persons between authorities that have the right to access full information and authorities that have the right to information on crimes for which charges have been filed (Sections 3 and 4 of the Records of Suspected Persons Registry Ordinance<sup>64</sup>). Authorities such as the Police and the Swedish Tax Agency have direct access to data from both the Swedish Criminal Records and Records of Suspected Persons.

<sup>59</sup> 2012:211.

<sup>60</sup> SOU 1999:60, p. 37, see also Bill 1985/86 p. 28.

<sup>61</sup> 1998:620.

<sup>62</sup> 1998:621.

<sup>63</sup> 1999:1134.

<sup>64</sup> 1999:1135.

Apart from the Swedish Criminal Records and Records of Suspected Persons, there are other registries of interest from an administrative standpoint, which also contain open data. Registry information at the Swedish Enforcement Authority regarding certain debts, and information from the Tax Agency on paid taxes and fees, may be requested without specific legal support as they are public documents.

Where a legal person applies for a permit, a conduct assessment is performed of the people who have influence over the business, such as the CEO and board members.

#### 11.4.2 *Conduct assessment without registry checks as well as duty to report*

There is also permit obligation with conduct assessment without any possibility of checking the Swedish Criminal Records and Records of Suspected Persons.

One form of conduct assessment that is not connected to permits is when there is a requirement for banks and other financial operations to, within the context of their business relations, attain risk-based customer due diligence in accordance with the Money Laundering Directive and its transposition into Swedish law through the Act on Measures against Money Laundering and Terrorist Financing.<sup>65</sup> Since it is the financial operations that have contact with their customers, it is also they who have the best ability to identify suspicious transactions. However, in this context, it is the *customers'* conduct (as viewed from a monetary transaction perspective) that is assessed, which is why only the *failure* to meet the requirement of risk-based customer due diligence may result in possible sanctions against the banks and financial activities covered by the regulation. The reporting obligation is perceived by many representatives of these operations as unclear, while placing a lot of responsibility on the individual officers at banks and companies that make qualified legal assessments.<sup>66</sup> Furthermore, suspicious transactions are reported to a very small extent, with only 1 per cent of the total number of operators having reported a suspicious transaction in 2010.<sup>67</sup>

Finally, the legislature has considered that, for some activities, it is sufficient with a reporting requirement (for example in carrying out foreign exchange operations), which means that a proprietor reports that a business activity is being initiated. Through the duty to report, the authorities' control and supervision is facilitated, as they thus become aware of the business proprietors that are active within a particular industry.

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65 2009:62.

66 Brå 2008.

67 Brå 2011b, p. 37 f.

### 11.4.3 *Industries and professions with permit and reporting requirements*

The following section presents a number of industries that are subject to administrative measures in the form of permit or reporting requirements (or similar measures). Section 11.5 then describes respective legislation. The Criminal Records Registry Ordinance<sup>68</sup> and the Records of Suspected Persons Ordinance<sup>69</sup> are referred to below as 'Criminal Records Registry' and 'Records of Suspected Persons'.

#### **Trade in certain types of goods**

- Permit for commercial trade in arms (Chapter 2, Section 10 of the Weapons Act). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Supply/export of defence/military equipment (Sections 1a, 4-6 of the Military Equipment Act).
- Permit for serving alcohol (Chapter 8, Sections 1, 11, and 12 of the Alcohol Act). *Conduct assessment with registry check in the Criminal Records Registry.*
- Wholesale trade of spirits, wine, strong beer and other fermented alcoholic beverages (Chapter 4, Section 1 of the Alcohol Act<sup>70</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Trade of industrial alcohol and alcoholic preparations (Chapter 6, Section 1 of the Alcohol Act). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Sale of medium-strong beer (Chapter 5, Section 5 of the Alcohol Act). *Requirement of notification before the commencement of business.*
- Serving of medium-strong beer (Chapter 8, Section 8 of the Alcohol Act). *Requirement of notification before the commencement of business.*
- Trade in tobacco products (Section 12 c of the Tobacco Act<sup>71</sup>). *Requirement of notification before the commencement of business.*
- Retail trade of pharmaceuticals (Chapter 2, Section 2 of the Act on the trade in medical products<sup>72</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Requirement of registration during trade with (certain) used goods (Act on Trade in Used Goods<sup>73</sup>). *Requirement of notification before the commencement of business.*

68 1999:1134.

69 1999:1135.

70 2010:1622.

71 1993:583.

72 2009:366.

73 1999:271.

- Permit for commercial sale of locksmith tools (Section 2 of the Act on the Sale of Locksmith tools<sup>74</sup>). *Conduct assessment without registry checks.*

### **Manufacture of certain types of goods**

- Permit to produce spirits, wine, medium-strong beer, strong beer and other fermented alcoholic beverages (Chapter 2, Sections 1-4 of the Alcohol Act<sup>75</sup> and Section 9 of the Excise Duty on Alcohol Act<sup>76</sup>). *Conduct assessment with registry check in the Criminal Records Registry.*
- Manufacture of defence/military equipment (Sections 1a and 3 of the Military Equipment Act<sup>77</sup>).

### **Handling of certain hazardous goods**

- Permit to handle, transfer or import explosives, or professionally or in a greater quantity handle flammables (Section 16 of the Act on flammable goods<sup>78</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*

### **Approval of the product for sale**

- Approval of drugs for sale (Section 5 of the Medicinal Products Act<sup>79</sup>) *Sale without authorisation carries penal sanctions.*

### **Sale of certain services (public as well as private sector)**

- Requirement of the provision of acceptable collateral during the sale of package tours (Section 1 of the Act on Package Travel<sup>80</sup>). *Requirement of the provision of financial security.*
- Permit to conduct certain business activities according to Section 23 of the Act concerning Support and Service for Persons with Certain Functional Impairments.<sup>81</sup> *Conduct assessment with registry check in the Criminal Records Registry.*
- Permit to conduct certain business activities according to Chapter 7, Section 1 of the Social Services Act.<sup>82</sup> *Conduct assessment with registry check in the Criminal Records Registry.*

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74 1979:357.

75 2010:1622.

76 1994:1564.

77 1992:1300.

78 2010:1101.

79 1992:859.

80 1992:1672.

81 1993:387.

82 2001:453.

- Permit to carry out certain services according to Chapter 7, Section 1 of the Swedish Social Services Act,<sup>83</sup> including residential care for children and youth, HVB. *Conduct assessment with registry check in the Criminal Records Registry.* Act regarding registry checks of staff at care facilities or accommodation that take in children.<sup>84</sup>
- A Government inquiry proposes that conduct assessment is introduced for the home-help services.<sup>85</sup>
- A Government inquiry proposes that conduct assessment is introduced in connection to the outsourcing to private contractors of the management of specially adapted housing, round-the-clock residential care, and non-institutional needs-tested care.<sup>86</sup>
- A Government inquiry proposes the introduction of certain requirements to be met by providers in terms of prudence, experience, and suitability, in accordance with the Swedish Social Services Act.<sup>87</sup> There are also requirements on the financial ability of providers to sustain operations in the long-term.

### Commercial traffic

- Taxi traffic permit (Chapter 3, Sections 5-12 of the Act concerning taxi traffic<sup>88</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Permit to operate commercial traffic (Chapter 2, Sections 1-6 of the Professional Transport Act<sup>89</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*

### Security operations

- Permit to, as a security company, take on some of the security tasks specified in the law on behalf of others (Section 2 of the Security Company Act<sup>90</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Eligibility and appointment requirements for security officers (Sections 4 and 5 of the Security Officers Act<sup>91</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*

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83 2001:453.

84 2007:171.

85 SOU 2015:7.

86 SOU 2015:7.

87 SOU 2015:7.

88 2012:211.

89 2012:210.

90 1974:191.

91 1980:578.

- Permit to operate an alarm installation business (Section 2 of the Act with certain provisions relating to alarm systems etc.<sup>92</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*

### **Rental operations**

- Permit to engage in the professional rental of cars and off-road motor vehicles without a driver for periods of less than one year (Sections 3 and 6 of the Car Rental Act<sup>93</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Permit to engage in professional activities for the purpose of providing temporary furnished accommodation (Section 2 of the Hotel Proprietors Act<sup>94</sup>). *Conduct assessment with (the possibility of) registry checks in the Swedish Criminal Records and Records of Suspected Persons.*

### **Gambling activities**

- Permit to arrange gambling on automatic gaming machines, token gaming machines and slot machines (Sections 25-27 of the Lotteries Act<sup>95</sup>). *Permit obligation. Indirect conduct assessment when there is a requirement for the alcohol permit criteria being met in organised use of token gaming machines.*
- Permit to organise roulette, dice and card games (Sections 32-34 of the Lotteries Act<sup>96</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Permit in accordance with the Act concerning the Arrangement of Certain Forms of Gaming Machines.<sup>97</sup> *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*

### **Lawyer, mediation, auditing and process serving activities**

- Admission requirements for becoming accepted as a member of the Swedish Bar Association (and thus being given the right to call oneself a “lawyer”, Chapter 8, Section 2 of the Code of Judicial Procedure). *Conduct assessment without registry check in the Criminal Records Registry.*

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92 1983:1097.

93 1998:492.

94 1966:742.

95 1994:1000.

96 1994:1000.

97 1982:636.



- Registration and suitability requirements to act as a real estate agent (Sections 5 and 6 of the Estate Agents Act<sup>98</sup>). *Conduct assessment with registry check in the Criminal Records Registry.*
- Authorisation and approval of auditors (Auditors Act<sup>99</sup> and Sections 2-6 of the Auditors Ordinance<sup>100</sup>). *Conduct assessment with registry check in the Criminal Records Registry.*
- Authorisation of process serving companies (Section 2 of the Act on the authorisation of process serving companies<sup>101</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Professional accountancy or auditing services, where the provider is not an approved or authorized auditor (Chapter 1, Section 2, point 11 Money Laundering and Terrorist Financing (Prevention) Act<sup>102</sup>). *Requirement of notification before the commencement of business and conduct assessment with registry check in the Criminal Records Registry (but without permit requirement).*
- Professional tax accountancy services (Chapter 1, Section 2, point 12 Money Laundering and Terrorist Financing (Prevention) Act<sup>103</sup>). *Requirement of notification before the commencement of business and conduct assessment with registry check in the Criminal Records Registry (but without permit requirement).*
- Professional independent legal professional services (offering certain services), except if employed by a law firm (Chapter 1, Section 2, point 14 Money Laundering and Terrorist Financing (Prevention) Act<sup>104</sup>). *Requirement of notification before the commencement of business and conduct assessment with registry check in the Criminal Records Registry (but without permit requirement).*
- Professional services, including establishing juridical persons and providing companies with office space, addresses, or similar services to companies (Chapter 1, Section 2, point 15 Money Laundering and Terrorist Financing (Prevention) Act<sup>105</sup>). *Requirement of notification before the commencement of business and conduct assessment with registry check in the Criminal Records Registry (but without permit requirement).*

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98 2011:666.

99 2001:883.

100 1995:665.

101 2010:1933.

102 2009:62.

103 2009:62.

104 2009:62.

105 2009:62.

### Financial operations and borrowing and lending operations

- Permit to conduct banking (so-called charter) or financing operations (Chapters 2-5 of the Swedish Banking and Financing Business Act<sup>106</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Permit to conduct insurance business (Chapter 2, Insurance Business Act<sup>107</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Permit to conduct investment fund operations (Chapter 2, Investment Funds Act<sup>108</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Permit to conduct securities trade business (Chapter 2, Securities Market Act<sup>109</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Permit to conduct certain consumer credit trade (Certain Consumer Credit-related Operations Act<sup>110</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Permit to operate payment institution (Chapter 2, Act on Payment Services<sup>111</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Permit to issue electronic money (Chapter 2, Electronic Money Act<sup>112</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and Records of Suspected Persons.*
- Reporting requirements as well as requirement to perform customer due diligence, in order to prevent exploitation financial services for the purpose of money-laundering and financing of terrorism (Chapters 2 and 3, Money Laundering and Terrorist Financing (Prevention) Act<sup>113</sup>). *Requirement to report.*
- Notification requirement for providers of currency exchange services (along with certain other financial services. (Section 2, Act on the Obligation to Give Notice of Certain Financial Operations). *Notification requirement and conduct assessment with registry checks in the Swedish Criminal Records.*
- Requirement for businesses conducting deposit operations to register with Financial Supervisory Authority, with additional requirements on owners and direction (Sections

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106 2004:297.

107 2010:2043.

108 2004:46.

109 2007:528.

110 2014:275.

111 2010:751.

112 2011:755.

113 2009:62.

6 and 7, Deposits Business Act<sup>114</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records and requirement to register*

#### **Financial advisory services, distance sales, and pawn brokering**

- The obligation (to the consumer) of providers of financial advisory services (Sections 4 and 5, Financial Advisory Services to Consumers Act<sup>115</sup>). *Obligation to notify*. Should traders fail to observe this obligation, the Swedish Consumer Agency may impose fines and even order them to cease providing financial advisory services.
- The obligation to notify for traders making distance sales, when goods and non-financial services respectively are offered (Chapters 2 and 3, Distance and Doorstep Sales Act<sup>116</sup>). Should traders submit inadequate notices, sanctions may be levied in the form of fines for disruptive marketing practices.
- Permit to operate as a pawnbroker (Sections 1 and 3-5, Pawnbrokers Act<sup>117</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records*

#### **Debt recovery and credit-rating services**

- Permit to operate as a pawnbroker (Sections 1 and 3-5, Pawnbrokers Act<sup>118</sup>). *Conduct assessment with registry checks in the Swedish Criminal Records*
- Permit to operate debt recovery activity (Sections 2 and 3, Debt Recovery Act<sup>119</sup>). *Conduct assessment without registry checks in the Swedish Criminal Records*.
- Permit to offer credit-rating services (Sections 3 and 4, Credit Information Act<sup>120</sup>). *Conduct assessment without registry checks in the Swedish Criminal Records*.

#### **Environmentally hazardous operations**

- Permit to engage in professional activities which aim to recycle, reuse or dispose of scrap cars (car breaker) (Chapter 15, Section 24 of the Environmental Code<sup>121</sup> and Section 3 of the Ordinance on Car Scrapping<sup>122</sup>). *Permit obligation without conduct assessment*.

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114 2004:299.

115 2003:862.

116 2005:59.

117 1995:1000.

118 1995:1000.

119 1974:182

120 1973:1173.

121 1998:808.

122 2007:186.

- Permit and reporting obligation for environmentally hazardous operations in accordance with Chapter 9, Section 6 of the Environmental Code.<sup>123</sup> *Permit or reporting obligation without conduct assessment.*

## 11.5 FURTHER INFORMATION ON PERMIT AND REPORTING OBLIGATION

The following is a detailed description of the regulations that exist for permits to engage in certain business activities, with or without a conduct assessment, and reporting obligation.

### 11.5.1 Requirement of a permit with conduct assessment

#### a) Vital societal commissions of trust – requirements of authorisation or registration

To be able to call oneself a lawyer, auditor or work as an estate agent – and the right to use a protected title – there are, in all cases, requirements of authorisation or registration. A lawyer requires the authorisation that they are accepted into the Swedish Bar Association (Chapter 8, Section 2 of the Code of Judicial Procedure), an estate agent must register with the Swedish Estate Agents Inspectorate (Section 5 of the Estate Agents Act<sup>124</sup>) and an auditor – authorised or approved – must register with the Supervisory Board of Public Accountants (Sections 4-6 of the Auditors Act<sup>125</sup>). For all these professions, a conduct assessment is carried out.

#### Lawyer

A lawyer must ‘[have] become known for integrity and in general also be [deemed] fit to practice law’ (Chapter 8, Section 2 of the Code of Judicial Procedure). In terms of integrity, the aspiring lawyer must, according to the legislative history, have a sound and good judgment.<sup>126</sup> Legal practice states that it is incumbent upon the applicant to prove their suitability, and that any ambiguity concerning important facts can burden the applicant when assessing their suitability.<sup>127</sup> The fact that the applicant has had a limited number of professional contacts and therefore provides a small number of references can result in

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123 1998:808.

124 2011:666.

125 2001:883.

126 NJA, [New Legal Archives] II 1943 p. 82.

127 See for example NJA 1990 C 125, NJA 1994 C 42 and NJA 1998 C 54.

the suitability being considered unproven.<sup>128</sup> Former crime, even if it occurred far back in time, affects the suitability assessment.<sup>129</sup> Even large debts can disqualify an applicant.<sup>130</sup>

As the Swedish Bar Association has no legal right to request excerpts from the Criminal Records Registry, it is up to the applicants themselves to request any excerpts if deemed necessary for consideration of their application for admission into the Association.

### **Estate Agent**

Estate agents are required, in connection with applying for registration, to have “integrity and in general be suitable as estate agents” (Section 6, point 5 of the Estate Agents Act). The Swedish Estate Agents Inspectorate, which processes applications for registration as a real estate agent, also performs regular inspections of registered real estate agents in the Criminal Records Registry and the Enforcement Authority’s records.

The general suitability assessment – assessment of honesty, reliability and integrity – will, according to the legislative history, address the requirements that should be imposed given the responsible position that a broker occupies in relation to both the client and their counterparty.<sup>131</sup> An estate agent who does not conduct their activities in accordance with good estate agent practice may be subject to disciplinary action in the form of a warning, reminder or, at worst, revocation of their registration. The Swedish Estate Agents Inspectorate verifies that registered estate agents continue to meet the suitability criteria at least once every five years, but can also initiate an inspection following reports, or for any other reason, on its own initiative.

### **Auditor**

The wording of the requirement for an aspiring auditor’s conduct is identical with that of estate agents; the applicant must “have integrity and in general be suitable to engage in audit activities” (Section 4 of the Auditors Act). Just as in the examination of prospective real estate agents, the integrity requirement addresses the prospective auditor’s general honesty, reliability and integrity.<sup>132</sup> Particular attention is given to failure to make payments or other mishandling of financial obligations.<sup>133</sup> The Supervisory Board of Public Accountants processes applications for approval and authorisation, and manages the supervision of auditors.

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128 However, see NJA 2007 N 14, where the Supreme Court amended the Bar Association’s decision to deny the applicant admission in favour of the applicant, despite limited reference documentation.

129 NJA 2000, p. 129.

130 NJA 2007 N 14.

131 Bill 1994/95:14, p. 35 and p. 66.

132 Bill 1994/95:152 p. 72.

133 See for example RÅ 2001 ref. 13.

### Authorisation of process serving companies

Professional service under the Service of Process Act<sup>134</sup> requires authorisation. Authorisation may be granted only if it can be assumed, in respect of organisation, management and ownership, that the company's business will be conducted in accordance with the law and in an expert and judicious manner. The Swedish National Police Board should be given an opportunity to comment before authorisation is granted (Section 2 of the Act on the authorisation of process serving companies<sup>135</sup>). Both staff and management at an authorised process serving company must be approved with respect to law abidance and general suitability for being employed in such an enterprise (Section 3 of the Act on the authorisation of process serving companies<sup>136</sup>). The county administrative boards are responsible for processing applications for authorisation.

#### *b) Manufacture and sale of certain goods*

In the case of commercial trade in certain types of goods, it seems more natural to set *particularly* high demands on the trader's professional skills and suitability, as viewed from a law-abidance perspective.

### Weapons

One type of product that can easily be misused if they fall into the wrong hands is firearms. A permit is therefore needed to conduct trade in firearms, for professionally receiving weapons for repair and overhaul, and for bringing in weapons and ammunition to Sweden, or for possessing firearms and ammunition (Chapter 2, Section 1 of the Weapons Act<sup>137</sup>). For an individual to be issued a weapon's permit requires an approved purpose and an absence of reasonable grounds for believing that the weapon will be misused (Chapter 2, Sections 4 and 5). The same requirements are placed on any individual borrowing a weapon (Chapter 3, Section 9). Possession of ammunition also requires a permit (Chapter 2, Section 8). Chapter 2, Section 3 of the Weapons Ordinance<sup>138</sup> states that weapons experience is additionally required for a weapon ownership permit to be issued. In the case of possession for hunting purposes, the applicant must have obtained a so-called hunting license, and sharpshooting weapons require that the applicant is an active member of a shooting-club and has demonstrated marksmanship ability. Issuing a permit for the possession of fully automatic weapons requires *extraordinary reasons*, and should as a rule be a time-limited permit (Chapter 2, Section 6).

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134 2010:1932.

135 2010:1933.

136 2010:1933.

137 1996:67.

138 1996:70.

The police examine applications for the commercial sale of weapons. Permits to engage in the commercial trade of firearms may only be “issued to parties who, with respect to knowledge, law abidance and other circumstances, can be considered suitable to engage in such activities” (Chapter 2, Section 10). A thorough conduct assessment is therefore carried out before any permit is issued: “Permits to engage in the trade of firearms may only be issued to parties who, with respect to knowledge, law abidance and other circumstances, are suitable to engage in such activities. Permits may only be granted for trade conducted in a professional manner” (Chapter 2, Section 10). According to the regulations and general advice of the Swedish National Police Board on weapons legislation, the provision should be interpreted as follows:<sup>139</sup>

Great importance should be attached to the applicant’s general law abidance. [...] Those convicted of, for example, violent crime, property crime, receiving stolen goods offences and accountancy crime, unless the crimes are considered to be insignificant, should not be issued a permit until a considerable length of time has passed, usually three to five years from the date when the criminal offence was committed. The period of time should relate to the severity of the offence. The same applies to parties known in the context of misuse. During permit consideration, the applicant’s taxation history should be taken into account. An applicant’s integrity and suitability may be questioned if, for example, VAT regulations were disregarded in prior business activities. Such breaches may constitute an indication that bookkeeping and other memorandums will not be maintained correctly. [...]

The police also has a responsibility for this supervision. If a crime is committed, the permit can be revoked. The same applies if the permit holder has disregarded a regulation, provision or condition that has been conferred under the Weapons Act.

The administrative regulations that concern the sale of weapons are complemented by the criminal provisions relating to *weapons crime* (Chapter 9, Section 1). An interim report on stricter penalties for weapons crime was presented in the report *Utredningen om skärpta straff för organiserad brottslighet*.<sup>140</sup> The report proposes a nuanced, expanded and stricter scale of penalties for weapons crime. In addition to the existing offence categories of weapons crime and serious weapons crime, it is proposed that the penal provision *particularly serious weapons crime* also be introduced. The penalty scale’s maximum sentence is therefore proposed to be extended from four to six years in prison. The proposed penalty

139 Chapter 13, Section 2 of FAP 551-3, RPSFS 2009:13, p. 35.

140 SOU 2014:7.

increase is partly in response to an increased number of shootings, mainly in Gothenburg, which have occurred in recent years.

### **Manufacture, export and supply of military equipment**

In Sweden there is a long-standing ban on the export of military equipment without the necessary authorisation. The manufacture and supply of military equipment (defence equipment) constitute licensable activities (Sections 1a, 2-4 of the Military Equipment Act<sup>141</sup>). The Swedish Agency for Non-Proliferation and Export Controls (ISP) is the administrative authority that (*inter alia*) has been commissioned to work with the control and supervision of defence equipment. Matters of principle importance or particular significance are handled by the Government (Section 1a of the Military Equipment Act<sup>142</sup>). What constitutes military equipment is determined by a technical classification procedure, for which the ISP is responsible.

Permits under the Military Equipment Act may only be granted if there are security or defence policy reasons for doing so and it does not conflict with Sweden's foreign policy (Section 1). The Parliament has adopted guidelines that will assist the Government and ISP when deciding on the export of military equipment.<sup>143</sup> Exports should, according to the guidelines, not be approved to states engaged in armed conflict with another state, states involved in international conflict that may lead to an armed conflict, states that have domestic armed troubles, or states where there is widespread and serious violations of human rights. In addition to these guidelines, the EU has adopted a common position on weapons exports, which is binding for Member States.

The military industry is a highly capital-intensive industry with high demands on technical knowledge, and is directly or indirectly subject to review by the Government via the Ministry for Foreign Affairs. It is therefore unlikely that it would be the subject, to any great extent, of exploitation for economic crime purposes. As the weapons industry has a significant turnover, which generates both jobs and tax revenue for the Swedish state, it is also often in the Government's interest, from an economic perspective, that the export of military equipment (in accordance with parliamentary guidelines for export) actually occurs.

### **Production and sale of alcoholic beverages**

Permits are required for both producing and for selling and serving alcohol. The point of departure, according to Chapter 2, Section 1 of the Alcohol Act, is that only a party approved

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141 1992:1300.

142 1992:1300.

143 Bill 1991/92:174, Report 1992/93:UU1, Written Communication from the Parliament to the Government 1992/93:61.



as a warehouse keeper under Section 9 of the Excise Duty on Alcohol Act<sup>144</sup> has the right to engage in the wholesale trade, producing and selling of spirits (liquor). A warehouse keeper is a person approved by the Tax Agency to, as part of their business, produce, process, store, receive (both nationally and within the EU) and dispatch alcohol products without alcohol taxes falling due. The same requirement is imposed with regard to the production of wine, medium-strong beer and strong beer; except in the home for personal use (as opposed to liquor and spirits, for which personal production is not allowed).

The permit process and control of liquor production is coordinated with fiscal control. The Swedish Tax Agency issues indirect production permits by approving a warehouse keeper, while the Public Health Agency of Sweden is responsible for national oversight. According to Section 5 of the Excise Duty on Alcohol Ordinance,<sup>145</sup> the Tax Agency examines applications to be approved as a warehouse keeper. Approval requires that the person “is suitable as a warehouse keeper with regard to their financial circumstances and circumstances in general.”

The warehouse keeper can send and receive goods from other EU countries tax-free. If an authorised warehouse no longer meets the requirements for suitability, approval shall be revoked.<sup>146</sup> During permit consideration, it is of great importance that the applicant’s financial reserves are deemed satisfactorily large.<sup>147</sup> Negligence with tax returns and tax payment constitutes a very strong reason for revocation, unless it is the case of a single offence.<sup>148</sup> When considering applications for approval as a warehouse keeper, the Tax Agency has the opportunity to request a restricted (for certain law-specified crimes) excerpt from the Criminal Records Registry. On suspicion of a crime or in the case of commenced preliminary investigations, the Swedish Economic Crime Authority can in certain cases provide information to the department in the Tax Agency that processes and issues tax warehouse permits.<sup>149</sup>

The requirements imposed by the Swedish Tax Agency on a potential warehouse keeper are thorough.<sup>150</sup> If the goods in a storing place are moved from the warehouse for storage at another location, they are considered released for consumption. Tax deferral is thus linked to the goods “physical separation” from the open market. This means that the warehouse keeper, when moving the goods, immediately becomes accountable for the

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144 1994:1564.

145 2010:173.

146 Bill 1994/95:56, p. 86.

147 See, for example, the Administrative Court of Appeal in Sundsvall’s judgment in case no. 3511-1999, pronounced on 27/09/2000.

148 The Administrative Court of Appeal in Sundsvall’s judgment in case no. 1766-03, pronounced on 19/09/2003, and the Administrative Court of Appeal in Sundsvall’s judgment in case no. 2163-2002, pronounced on 03/01/2003.

149 National Intelligence Service 2012, p. 4.

150 SKVFS 2013:12.

alcohol tax attributable to the goods. Repeated inability to pay alcohol tax at the time of reporting may in other words be a sign that the sale of alcoholic beverages is taking place in contravention of the law, which in turn may constitute grounds for revocation of authorisation as warehouse keeper.

### **Wholesale trade of tobacco products**

Tobacco products for which excise duty has not been paid (“untaxed goods”) are subject to a tax deferral procedure similar to that of the wholesale trade of alcoholic beverages. It is only when the tobacco product has been released for consumption that the excise duty falls due for payment. Anyone who trades in untaxed tobacco products must therefore also apply to become approved as a warehouse keeper (Section 10 of the Act on Excise Duty on Tobacco<sup>151</sup>).

Just as in the consideration of warehouse keepers regarding alcoholic beverages, approval requires that the applicant is deemed appropriate in view of their financial circumstances and circumstances in general, and utilises a space located in Sweden that can be authorised as a tax warehouse (Section 10). The same requirements are imposed on the warehouse design as are imposed for the storage of alcohol.<sup>152</sup>

### **Serving of certain alcoholic beverages**

According to Chapter 8, Section 1 of the Alcohol Act, “a permit (to serve alcoholic beverages) is required from the municipality where the serving locale is located”. A comprehensive assessment of the applicant’s conduct is performed, as the permit “may only be issued to a party who shows that he or she, with respect to their personal and financial circumstances and circumstances in general, is suitable to conduct the business activities, and that the business will be operated in accordance with the requirements imposed by this Act” (Chapter 8, Section 12 of the Alcohol Act). The applicant may be required to present excerpts from the Enforcement Authority, a certificate from the Tax Agency regarding VAT registration etc., a bankruptcy certificate from the District Court, certificates of education and employment history, a lease contract, purchase agreement and financing plan.<sup>153</sup> A statement from the police authority is obtained in matters of alcohol permits. In their statement the Police shall “report all circumstances that form the basis for the Authority’s assessment of the individual case and particularly comment on the applicant’s general suitability for the business” (Chapter 8, Section 11 of the Alcohol Act), or as it is expressed in the legislative history:<sup>154</sup>

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<sup>151</sup> 1994:1563.

<sup>152</sup> SKVFS 2013:12.

<sup>153</sup> Bill 1994/95:89 p. 64.

<sup>154</sup> Bill 2009/10:125 p. 97.

Through the police authority statement, the municipality receives information about conditions in the area where the applicant wishes to establish licensed activities, and the Police assessment of the manner in which these conditions are likely to be affected by the pending establishment or extension of the same. Furthermore, the Police provides information about the applicant based on the Swedish Criminal Records and Records of Suspected Persons, the data from which, along with other information, constitutes the basis for the municipal assessment of whether the applicant is fit to be entrusted with serving alcoholic beverages to the public.

It is thus not only the individual proprietor's suitability and professional skills that are relevant in considering an application for a permit to serve alcohol, but also the conditions in the areas in which the applicant wishes to establish licensed activities. Areas with known drug abuse problems, nearby schools or youth centres are examples of areas where the municipality may wish to prevent the establishment of a business licensed to serve alcohol. The potential risk of disruption to local residents may constitute circumstances that lead to rejection of the application for a permit to serve alcoholic beverages (Chapter 8, Section 17).

Applicants must undergo a special knowledge test to show that they "have the knowledge of this law and associated regulations necessary to statutorily conduct business involving the serving of alcohol" (Chapter 8, Section 12).

### **Retail trade of pharmaceuticals to consumers**

The monopoly on the retail trade of pharmaceuticals that has been in play since the 1950s is now abolished, which means that anyone who fulfils the requirements of the Act on the trade in medical products<sup>155</sup> has the right to a permit to conduct such activities. A permit can only be issued to a party that, with respect to their personal and financial circumstances and circumstances in general, is suitable to conduct the business activities, and is capable of fulfilling a range of business-specific requirements (Chapter 2, Section 4). Examination of the application is performed by the Medical Products Agency.

The examination relates to the applicant's personal and financial circumstances in a broad sense. If the application relates to a legal person, the suitability requirements in the first instance apply to the company's management, that is, those natural persons who have a significant influence in the business. Drug offences and drug-related crime are examples of personal unsuitability that can lead to a permit being denied.<sup>156</sup>

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155 2009:366.

156 Bill 2008/09:145 p. 105.

### **Approval or registration of pharmaceuticals for sale to consumers**

According to the general rule in Section 5 of the Medical Products Act,<sup>157</sup> a drug may only be sold after being approved or registered in accordance with Section 2b or 2c of the Medical Products Act, or is covered by a recognition of an approval or a registration that has been issued in another state in the European Economic Area. Approval and registration is issued in Sweden by the Medical Products Agency.

### **Locksmith tools**

The manufacture and sale of locksmith tools has a special category, as the regulation is more thorough and detailed than that which applies to the trade and manufacture of most other types of goods. According to Section 2 of the Act on the Sale of Locksmith tools,<sup>158</sup> there are not only permit requirements but also requirements on the prospective trader's customer selection. The sale of locksmith tools may "only be made to parties who in their profession or otherwise have a noteworthy need of locksmith tools and can reasonably be assumed not to be misusing them." Furthermore, it states that "a permit shall be given to a party who is known for their orderliness and trustworthiness." Examination of applications is performed by the local police authority.

This legislation has the *sole* purpose of crime prevention.<sup>159</sup> The regulations and general advice of the Swedish National Police Board for applying the Act on the Sale of Locksmith tools state that the trader's consideration of a customer's professional need for locksmith tools is rigorous.<sup>160</sup>

Anyone who has a permit to engage in the professional sale of locksmith tools shall record the following data in a sales ledger for each sale:

1. date of the sale,
2. the buyer's full name, personal identity number, occupation, postal address and telephone number and, if applicable, name of company,
3. type of identification produced; buyers should be able to prove their identity by showing identification documentation[...],
4. number and nature of locksmith tools, and
5. the buyer's justification for needing locksmith tools.

The permit holder shall also keep a stock book. The stock book shall show inventories of locksmith tools that can be checked against purchase documents/equivalent and the sales journal.

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<sup>157</sup> 1992:859.

<sup>158</sup> 1979:357.

<sup>159</sup> Bill 1978/79:169.

<sup>160</sup> Section 4 FAP 579-1, RPSFS 2000:27, p. 2.

The sales journal and stock book, along with associated documents, shall be kept for ten years from the date on which the last entry was made. If the business shuts down, the aforementioned documents are to be turned over to the police authority. Permit holders are obligated to provide product samples from the sales range as well as the sales journals and stock books on the request of the police authority.

*c) Permit for sale of certain welfare services*

The gradual deregulation within the public sector has opened up a number of markets for private market actors. One important market, which has become the subject of increased control and regulation, is social services. Those recipients of an approved work initiative under the Social Services Act,<sup>161</sup> or the Act concerning Support and Service for Persons with Certain Functional Impairments (LSS),<sup>162</sup> have a statute-regulated possibility of choosing a private provider for this approved work initiative.

**Permit-required work in accordance with the LSS**

The professional work which, according to Section 23 of the LSS requires a permit includes, personal assistance, short stays away from home, short-term supervision for school children, accommodation in a family home or residential care facility for children or young people, residential care facilities for adults or other specially adapted housing and day care for people with developmental disabilities.<sup>163</sup> The permit requirement for engaging in personal assistance operations was added in 2011.<sup>164</sup> Applications for permits are handled by IVO (The Health and Social Care Inspectorate), which is also responsible for supervision (Section 25 of the LSS). Since 1 July 2013, it is stated in Section 23, second paragraph of the LSS that a permit may only be issued to a party that, with respect to their financial circumstances and circumstances in general, is suitable to conduct such operations. The Criminal Records Registry is checked in conjunction with applications being considered.

There is also a special law on registry checks for staff involved in certain operations directed at children with disabilities.<sup>165</sup>

**Permit-required work in accordance with the Social Services Act**

According to Chapter 1 of the Social Services Act, a permit is required for residential care homes for children and young persons (HVB), residential care facilities in general, short-term accommodation with 24-hour care, and non-institutional care facilities. Applications

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<sup>161</sup> 2001:453.

<sup>162</sup> 1993:387

<sup>163</sup> Municipalities and county councils instead have notification obligation, aside from operations involving personal assistance.

<sup>164</sup> SOU 2005:100; Bill 2009/10:176.

<sup>165</sup> SFS 2010:479; Bill 2009/10:176.

for permits are handled by IVO (The Health and Social Care Inspectorate), which is also responsible for supervision (monitoring of work initiatives is the responsibility of the relevant municipality under the Social Services Act)<sup>166</sup>. Permits to conduct such activities may only be granted if the operation meets the requirements of good quality and safety (Chapter 7, Section 2 of the Social Services Act). The quality requirement stipulates, among other things, that the person in charge of the operation must have adequate training, previous experience and documented personal suitability. Registry checks are carried out pursuant to Section 16B, first paragraph, a), of the Criminal Records Registry Ordinance.<sup>167</sup>

There is also a special law regarding registry checks of staff at care facilities or accommodation that take in children.<sup>168</sup>

#### *d) Permits to conduct commercial traffic*

##### **Taxi traffic**

Anyone wishing to engage in taxi business is subject to the permit requirement in Chapter 2, Section 1 of the Act concerning taxi traffic.<sup>169</sup> A taxi driver license is also required. The Swedish Transport Agency decides on taxi driver licenses and permits to run taxi operations, and is also the supervisory authority.

For those applying for taxi permits, there are requirements imposed on both professional skills, adequate finances and reputation and suitability (Chapter 2, Section 5). The applicant must pass a test in professional skills. The applicant for a taxi permit must also prove that he or she has sufficient resources to start and run the company appropriately (Chapter 2, Section 9). This requirement must be demonstrated continuously, even after the permit has been issued).

The requirement of good reputation means that the applicant must be willing and able to fulfil their obligations towards the general public (Chapter 2, Section 11). The requirement is not considered met if a person has been convicted of a serious crime, one or more serious or repeated breaches of the Act concerning taxi traffic<sup>170</sup> or regulations stipulated in connection with the Act, road traffic and transport regulations, or regulations on salary and employment conditions in the industry. An insufficient law abidance focuses mainly on tax crime, drug offences, crimes against creditors and property crime.<sup>171</sup> When the application applies to passenger transportation, violent crime is also taken into account. According to Section 10 of the Criminal Records Registry Ordinance and Section 3 of the

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166 Municipalities and county councils are instead subject to notification obligation.

167 1999:1134.

168 2007:71; Bill 2006/07:37, p. 12.

169 2012:211.

170 2012:211.

171 Bill 1997/98:63, p. 68.

Records of Suspected Persons Ordinance, the Swedish Transport Agency is entitled to access full information from these registries relating to those applying for a taxi permit or taxi driver license.

Both taxi permits and taxi driver licenses can be revoked (Chapter 4, Sections 1 and 6). In the case of minor discretions, a warning may instead be issued. If the revocation occurs on account of a crime being committed or other offences, a waiting period (unsuitability period) of not less than three years and a maximum of five is imposed. This is especially applicable in the case of serious or repeated crime.<sup>172</sup>

### **Commercial goods and passenger transportation**

Commercial goods and passenger transportation requires a permit very similar to that of taxi operations. In examining whether the applicant meets the requirements of good reputation, consideration is given to their willingness and ability to fulfil their obligations to the general public, general law abidance, and other circumstances of importance. (Chapter 2, Section 4 of the Professional Transport Act).

#### *e) Permits for certain financial operations*

The regulation of the financial sector is very extensive, so only a selection of the provisions deemed to be of particular relevance to economic and organised crime will be dealt with below.

### **Measures against money laundering and terrorist financing**

The Third Money Laundering Directive (2005/60/EC) has been implemented in Swedish law.<sup>173</sup> According to the Act<sup>174</sup> on Measures against Money Laundering and Terrorist Financing, an operator is to take measures to ensure customer due diligence. This might involve verification of the customer's identity, and the requesting of information on the purpose and nature of business relations (Chapter 2, Section 3). Customer due diligence must be established before establishing business relations or before an individual transaction is carried out (Chapter 2, Section 9). If customer due diligence has not been achieved, neither business relations nor an individual transaction may be conducted (Chapter 2, Section 11).

The operator is also obligated to continually review transactions in order to detect suspicious transactions and report them to the Finance Police (Chapter 3, Section 1).

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<sup>172</sup> Bill 2011/12:80, p. 122.

<sup>173</sup> Bill 2008/09:70, p. 2.

<sup>174</sup> 2009:62.

### **Banking activities (banking and financing operations)**

Banking and financing operations are subject to permit obligation in accordance with chapter 2, Section 1 of the Swedish Banking and Financing Business Act.<sup>175</sup> The Swedish Financial Supervisory Authority is the authorising and supervisory authority. The following requirements must be met for a permit to be issued (Chapter 3, Section 2):

1. there is reason to believe that the proposed activity will be conducted in accordance with the provisions of this Act [...];
2. those who have or may be expected to have a qualifying holding in the company are deemed fit to exercise a significant influence over the management of a credit institution, and
3. those who hold a position as board member or CEO in the company, or as replacement for said positions, have sufficient insight and experience to participate in the management of a credit institution and are otherwise suitable for such a task.

The applicable suitability requirements are of particular interest. The suitability assessment of shareholders is viewed in light of the acquisition, involving a qualifying holding for the shareholder, being *in itself* subject to permit obligation (Chapter 14, Section 1). Among other things, the assessment will consider the reputation and financial strength of the acquirer.<sup>176</sup>

No criterion directly corresponding to “reputation” is found in the current regulation. However, within the framework for assessing the acquirer’s reputation, factors identified as directly disqualifying under existing regulations can be factored in, i.e., that the acquirer has significantly disregarded their obligations in business or in other financial matters or is guilty of serious crimes. Examples of this could be that the owner has been convicted of economic crimes or has been subject to bankruptcy proceedings. It should however be possible to interpret concept of “reputation” further and also relate to an assessment of the acquirer’s law abidance, experience, and judgment in general.

The Swedish Financial Supervisory Authority also acts as the supervisory authority for banking and financing operations. The Authority can order a business without a permit to cease operations, and, if the order is not complied with, can apply to the Court for compulsory liquidation (Chapter 15, Sections 18 and 19).

### **Debt collection activities**

According to Section 2 of the Debt Recovery Act,<sup>177</sup> debt collection activities – debt recovery on behalf of others or claims that have been taken over for recovery – may only

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<sup>175</sup> 2004:297.

<sup>176</sup> Bill 2008/09:155, p. 87.

<sup>177</sup> 1974:182.



be conducted with a permit from the Data Inspection Board. Permits are granted only if 'the activities are likely to be undertaken in an expert and judicious manner' (Section 3). The applicant for a permit must provide proof of their conduct and competence.

In the preamble to the Debt Recovery Act, two regulatory options have been considered against each other; notification and permit obligation respectively.<sup>178</sup> The Official Report argued that while 'the notification option does not [allow for] any preliminary examination of the practitioner's suitability', 'the concession option has undeniable advantages over a notification system [...] [as] the main advantage is that a permit requirement allows for a preliminary examination of the practitioner's suitability.' The Government went along the lines of the Official Report.

The Data Inspection Board also has supervisory responsibility regarding compliance with the Debt Recovery Act (Section 13) and may revoke any issued permit if the permit holder breaches a regulation of this Act, or any provision issued pursuant to the Act, and corrective measures are not taken, or if the conditions for the permit otherwise no longer exists (Section 15).

### **Credit-reporting activities**

A permit is required to engage in credit-reporting activities in accordance with Section 3 of the Credit Information Act.<sup>179</sup> However, credit institutions and credit-reporting operations run through the publication of credit information in accordance with the Freedom of the Press Ordinance and the Freedom of Expression Act are exempt from the permit requirement (Section 3). Permits are granted by the Data Inspection Board and are only issued if the activities are likely to be undertaken in an expert and judicious manner (Section 4). The requirement of expertise has been interpreted by the Data Inspection Board as referring to experience in the credit information industry and knowledge of the law.

The Data Inspection Board may impose conditions on how a company's credit-reporting operations are to be conducted and on the obligation of a company to report changes in circumstances that are legally relevant to the business's operation (Section 4).

The Data Inspection Board supervises compliance with the law (Section 15) and has the right to inspect a business operation (Section 16). If a permit holder is in breach of a regulation in the Credit Information Act, the Data Inspection Board may revoke the permit, if rectification cannot be otherwise achieved (Section 17).

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178 Bill 1974/42, p. 87.

179 1973:1173.

*f) Permits for rental operations*

**Car rental operations**

The commercial rental of cars and off-road vehicles for less than one year (not leasing) may only be conducted by persons with a permit to conduct such business (Sections 1 and 3 of the Car Rental Act<sup>180</sup>). The Swedish Transport Agency processes permit applications. Permits are only issued to individuals deemed fit to run the business, with respect to professional skills, financial circumstances, the willingness and ability to fulfil their obligations to the public, abidance to the law in general and other circumstances of significance (Section 6). Those requirements imposed on personal suitability and conduct are similar to those imposed on the holder of a commercial transport permit.<sup>181</sup>

The Swedish Transport Agency oversees compliance with the law. If serious abuses occur within the rental business or any other business which the permit holder operates, or if the conditions for the permit are no longer met, the permit shall be revoked. A warning can also be issued.

The Transport Agency has, however, stated that the permit obligation for car rental will be abolished.<sup>182</sup> The industry is small, and since it is unusual to find serious crimes or tax debts among rental companies, only a few permits have been revoked. The assessment is that the industry is working fine and will probably continue to do so in the event of a possible permit abolishment. The proposal is currently being prepared by the Ministry of Enterprise, Energy and Communications.

*g) Permits for arranging certain gambling activities*

**Permits for arranging restaurant casinos and certain gaming machines**

As a rule, the Swedish state has a statutory monopoly on gaming for money or money's value. This means that in some cases it is completely forbidden to offer gaming for money (e.g., slot machines, which can only be found on ships in international waters or state casinos), while in some cases it is only illegal for anyone without a permit (i.e., the market is open to those who meet certain criteria, such as when applying to operate a restaurant casino). In the Swedish gaming market, Swedish gaming companies and organisations that have received permits endeavour to arrange this type of gaming.

The Swedish Gambling Authority is the governmental agency that has overall responsibility for controlling (supervising) gaming and lottery operations, issuing permits for

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180 1998:492.

181 Bill 1997/98:63, p. 106.

182 Swedish Transport Agency 2012.

national lotteries, gaming machines, restaurant casinos and certain bingo permits, as well as special permits for lottery tickets along with equipment for verification and drawing.

Certain types of licensable gaming activities have historically been found in industries that are particularly vulnerable to economic crime, such as the restaurant industry. The types of games that typically apply are gaming machines and token gaming machines, and the conducting of restaurant casinos. Common to the requirements for those who wish to arrange these types of games is that the game organiser is deemed suitable to provide such gaming activities, and that money bets and potential winnings are vigilantly limited.

### **Setting up automatic gaming machines, slot machines and token gaming machines**

Permits to arrange gaming on slot machines and token gaming machines may be issued if the gaming takes place on a ship in international waters (Section 26 of the Lotteries Act). Permits to arrange gaming on token gaming machines may also be issued if the gaming is organised in conjunction with hotel and restaurant operations that have (or at least fulfil the criteria to be granted) a permit to serve alcoholic beverages in accordance with the Alcohol Act. Thus, according to the provision, there is a link between the permit to serve alcohol and the permit to arrange gaming on token gaming machines. If a conduct assessment has already been performed during a suitability assessment in connection with an alcohol permit application, it can therefore also constitute grounds for a permit to arrange token gaming machines. As a result, conduct assessment in this case is not performed by the Swedish Gambling Authority. As gaming on token gaming machines may only be run by state gaming companies, it is *AB Svenska Spel* that organises the gaming machines. The Swedish Gambling Authority can then issue an operating permit to individual business proprietors that fulfil the criteria. An automatic gaming machine permit may be granted if the game is arranged in connection with a public amusement activity, in the form of an amusement park, etc. (Section 25). No conduct assessment is necessary in this case.

### **Arrangement of roulette, dice and card games**

Roulette, dice and card games are also counted as “lottery activities”. Permits are granted if the applicant is deemed suitable to run the business. The consideration involves taking into account the applicant’s experience in the area, financial circumstances, willingness and ability to fulfil their obligations to the public, abidance to the law in general and other circumstances of significance (Sections 32 and 33). It therefore involves a rather thorough suitability assessment. The Swedish Gambling Authority has the right to request excerpts from the Swedish Criminal Records and Records of Suspected Persons.

If a lottery organiser who has been granted a permit does not adhere to the provisions of the Lotteries Act, the authority that granted the permit may issue a warning or revoke the permit (Section 51).

### **Arrangement of gaming machines**

According to Sections 1 and 3 of the Act concerning the Arrangement of Certain Forms of Gaming Machines,<sup>183</sup> permits are required for such games on mechanical or electronic gaming machines arranged for the general public, or otherwise provided for the purpose of making money, and which do not does provide winnings or only provide winnings in the form of free games on the machine. The organiser of these gaming machines is responsible for the machine not being used for a purpose other than its intended purpose, that good order prevails within the premises or at the location where the game is used and that children and young people are not unduly attracted to participate in the game (Section 2).

When considering a permit, the Swedish Gambling Authority shall assess the risk of a gaming machine being used for purposes other than that covered by the application, or the possibility of the business activity being run in violation of the law or conducted in an environment that is unsuitable for children or young people. The examination shall particularly consider the applicant's suitability, the number of gaming machines, the nature of the games, and the premises' or site's suitability and location (Section 4).

The legislative history shows that "amusement machines" have come to represent a major problem due to illegal gambling and gaming in unsuitable environments.<sup>184</sup> It is therefore important that the game organiser has the will and ability to prevent the occurrence of alcohol abuse, drug abuse, crime or antisocial behaviour. The Swedish Gambling Authority can revoke a permit (Section 6).

#### *h) Permits to engage in hotel rental activities*

According to Section 2 of the Hotel Proprietors Act,<sup>185</sup> a permit from the local police authority is required to run a hotel or guesthouse business. A permit may be issued if there are no reasons to assume that the applicant's running of the business will pose a danger to public order and safety. The Police are required to keep a registry of hotel and guesthouse businesses that have been granted a permit (Section 9).

If a permit holder is not fit to run the business due to being a repeat offender against this Act or in breach of other provisions that apply to the business, and despite requests has failed to take corrective action within a reasonable time or otherwise, the police authority will revoke the permit (Section 19). If it is necessary in order to maintain public order and safety, the police authority may also prohibit the business activities under penalty (Section 20).

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183 1982:636.

184 Bill 2004/05:3, p. 12.

185 1966:742.

*i) Permits to engage in alarm installation and security activities, and qualification requirements for security activities' staff*

### **Permit to engage in security activities**

A person who is professionally engaged in security activities must have a permit in the form of authorisation pursuant to Section 2 of the Security Company Act<sup>186</sup>.

Authorisation may only be granted if it can be assumed that the business will be conducted in an expert and judicious manner, will not be inappropriately oriented from a public viewpoint, and will fulfil the requirements imposed on such activities as the company aims to conduct (Section 3). All staff of an authorised security company must be approved following evaluation with regard to abidance to the law, civic reliability and suitability in general for employment in such a company. Requirements also apply to the company's directors and management (Section 4). Evaluation (approval) of said persons is performed by the county administrative board (Section 6).

According to the legislative history, the requirements regarding registry checks for persons to be employed in a security company are very strict. A person who is to be approved for employment in a security company undergoes by and large the same registry checks (Section 10 of the Ordinance on Security Companies etc.<sup>187</sup>) as persons to be employed as police officers.<sup>188</sup> Requests for authorisation are examined by the county administrative board, whereby the board obtains a statement from the Swedish National Police Board before authorisation is granted (Section 5).

Supervision of security companies is the responsibility of the county administrative board (Section 8). As part of the supervision, the county administrative board closely inspects that the conditions for authorisation are still fulfilled. The county administrative board may order an authorised security or training company to take the corrective actions and other measures brought about by the supervision (Section 12), but it can also revoke the authorisation when there are no longer conditions for such, or where there are otherwise specific reasons for a revocation (Section 13).

### **Qualification requirements for security staff (security guards and security officers)**

Both security officers, who are appointed by the local police authority (or the Swedish National Police Board if the position covers several districts), and security guards are subject to qualification requirements. The security officer's mission is to contribute to maintaining public order (Section 1 of the Security Officers Act<sup>189</sup>). Security officers have an obligation to follow instructions and to report to the Police. In practice, the appointment

186 1974:191.

187 1989:149.

188 Bill 2005/06:136, p. 18.

189 1980:578.

means that security officers have powers normally only belonging to a police officer. Only those considered suitable with respect to law abidance and other circumstances, and those between the age of 20 and 65, are appointed as security officers (Section 4). If the qualification requirements are no longer fulfilled, the appointment may be revoked (Section 9). For security officers, there is a statutory requirement that they must undergo a training programme developed by the National Police Board and conducted under the direction of the local police authority (Section 4). The training requirements for security guards are not as strict. Although the security industry requires (and organises) training for security guards, there is not the same statutory training requirement involving state provided training. This is mainly due to security guards not having the police powers that the security officers have (the right to take intoxicated persons into custody or those disrupting public order, etc.).

### **Permit to operate an alarm installation business**

An alarm installation business may not be run without a permit. A permit requires that an applicant can be expected to run the business with precision and care, and that the applicant (or management in the company) is known for their law abidance and orderliness (Section 2 of the Act with certain provisions relating to alarm systems etc.<sup>190</sup>). The requirement of law abidance and orderliness aims, according to the legislative history, to prevent persons with a criminal record from getting involved in the alarm installation business.<sup>191</sup> Registry excerpts from the central police registry are acquired during consideration of applications for a permit to operate an alarm installation business. The permit requirement itself is intended to ensure that alarm systems are handled with proper care and caution, so that the Police's problems with false alarms are reduced.<sup>192</sup>

#### *j) Permit to handle flammables of explosives*

To handle, transfer or import explosives, or professionally or in a greater quantity handle flammables, requires a permit in accordance with Section 16 of the Act on flammable goods<sup>193</sup>. The Act outlines a number of specific operational and competence requirements for obtaining a permit (Sections 6-16). Registry checks are performed in the Criminal Records and Records of Suspected Persons.

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<sup>190</sup> 1983:1097.

<sup>191</sup> Bill 1982/83:163, p. 41.

<sup>192</sup> Bill 1982/83:163, p. 41.

<sup>193</sup> 2010:1101.

### 11.5.2 Requirement of a permit *without* conduct assessment

#### a) Environmentally hazardous operations

Permit obligation (or in certain cases – depending on the type of environmentally hazardous substance involved – notification obligation) is necessary to establish or run an environmentally hazardous business where hazardous substances, which necessitate environmental hazard management, are part of or expected to be part of the business activities (Chapter 9, Section 6 of the Environmental Code<sup>194</sup>). The environmentally hazardous substances referred to here are presented in Section 4 of the Appendix to the Ordinance<sup>195</sup> concerning Environmentally Hazardous Activities and the Protection of Public Health (Section 5 of the aforementioned Ordinance). The storage, transportation and interim storage of waste or hazardous waste, for example, require (depending on the type of waste) a permit or notification. Applications and notifications are as a rule made to the county administrative board, which is generally also responsible for supervision.

#### b) Authorisation requirement for car breakers

The operator of a scrapyards must be authorised. It is the county administrative board that considers the authorisation of car breakers (Section 6 of the Ordinance on Car Scrapping<sup>196</sup>). The preamble states that ‘an authorisation requirement for all car breakers leads to better conditions for the control of operations, and that the same conditions will apply to all actors in the industry. This benefits, among others, the more ambitious car dismantling facilities that meet higher environmental standards.’<sup>197</sup> The requirements for authorisation also focus mainly on fulfilling a series of environmental requirements, which can be said to indirectly involve an examination of the applicant’s suitability and to some extent conduct. However, no registry checks are performed in the Swedish Criminal Records and Records of Suspected Persons.

### 11.5.3 Other requirements for running certain businesses, with or without conduct assessment

#### a) Duty to report/notify or duty to register

Even if a certain business is not subject to permit obligation, it may be required for the trader to report the business activity to the supervisory authority.

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194 1998:808.

195 1998:899.

196 2007:186.

197 Bill 2000/01:47, p. 22.

### **Monetary exchange activities (and certain other financial activities)**

Monetary exchange activities are subject to notification obligation according to the general rule in Section 2 of the Certain Financial Operations (Reporting Duty) Act<sup>198</sup>. The Swedish Financial Supervisory Authority keep a registry of persons who have submitted reports. There are requirements on an exchange company's owner and management, but no examination of the owner is performed as it is only the business activity which is subject to the reporting duty.

Parties who have significantly breached obligations in their business activities or who have committed serious crimes may not engage in business involving a duty to report (Section 3).

### **Deposit-taking activities**

Limited liability companies or economic associations that intend to engage in deposit-taking activities, but which are not covered by the Deposit Insurance Act<sup>199</sup>, are required to apply for registration of their business to the Swedish Financial Supervisory Authority, in accordance with Section 7 of the Deposit-taking Activities Act<sup>200</sup>. Companies engaged in deposit-taking activities may not have people in management positions or holders of qualified shares that have "significantly breached obligations in business or in other financial matters or who have committed serious crimes" (Section 6). Examples of deficient character include accountancy crime or tax crime, failure to pay taxes or improper proceedings in conjunction with bankruptcy.<sup>201</sup> The Financial Supervisory Authority conducts annual inspections to ensure the character requirement is continuously met. The Financial Supervisory Authority may, under penalty, order an unregistered deposit-taking operation to cease activity (Section 15 of the Deposit Insurance Act).

### **Sale of used goods**

According to Sections 2 and 3 of the Act on Trade in Used Goods<sup>202</sup>, parties intending to engage in the commercial trade of certain types of used goods have to report the trade for registration with the local police authority. The law aims to prevent the receiving of stolen goods: "to hinder the provision of stolen or otherwise unlawfully acquired goods and to facilitate the Police's tracking of such goods" (Section 1). The trader is obligated to keep an account of acquired and received goods (Section 5). The trader may not receive used goods from parties that fail to supply adequate proof of identity or are known to the trader (Sections 7 and 8). The local police authority is responsible for supervision of sales activities

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198 1996:1006.

199 1995:1571.

200 2004:299.

201 Bill 2002/03:139, p. 567.

202 1999:271.



that fall under the scope of this Act. No form of registry checks are carried out during applications for registration.

### **The sale and serving of medium-strong beer**

The sale, production and serving of different types of alcoholic beverages constitute almost exclusively licensed operations. An exception, however, is the serving of medium-strong beer, which may be conducted following notification to the municipality in accordance with Chapter 8, Section 8 of the Alcohol Act. Medium-strong beer can only be sold to persons over 18 (Chapter 3, Section 7). The party with the notification obligation shall “exercise special control (personal control) over the serving. The personal control should involve the development and application of a suitable programme for the business” (Chapter 8, Section 8).

### **The sale of tobacco products**

Retail sale of tobacco products requires notification to the municipality according to Section 12c of the Tobacco Act<sup>203</sup>. Tobacco products may not be sold, or otherwise supplied in the course of business, to anyone under the age of 18, which is why parties supplying tobacco products must make sure that the recipient has reached that age (Section 12). The tobacco vendor, as with the vendor of medium-strong beer, is required to exercise personal control over the sale (Section 12c). Supervision is exercised by the municipality and the local police authority, and they can issue orders and bans in cases of violation of applicable laws in the area.

#### *b) Requirement of the provision of security*

The Act on Travel Guarantees<sup>204</sup> stipulates that a person who “is the organiser or retailer of package tours is required, according to the Act on Package Travel<sup>205</sup>, and before marketing a package tour or transportation that takes place together with a package tour, to provide financial security to *Kammarkollegiet* [Legal, Financial and Administrative Services Agency].”

#### *c) Duty to inform*

### **Obligations of the operator regarding financial advice**

According to Sections 1 and 4 of the Financial Advisory Services to Consumers Act<sup>206</sup>, an operator, who provides consumers with financial advice on investments, shall ensure that

203 1993:581.

204 1972:204.

205 1992:1672.

206 2003:862.

the person providing the actual advice has sufficient expertise, documents what has transpired during the advisory meeting and submits the documentation to the consumer.

The Swedish Consumer Agency supervises compliance with the law and can, under penalty, order an operator that provides financial advice in violation of the requirements stipulated in the Act or in the provisions issued pursuant to the Act, to cease their business activity (Section 9).

#### 11.5.4 *Schematic summary of the described industries*

In conclusion, the manner in which the above-mentioned industries are regulated can be clarified and put in relation to one another using the following matrix.

Commission of trust	Permit/notification authority	Supervisory authority	With checks in CRR	With checks in RSP
Lawyer	The Swedish Bar Association <sup>207</sup>	The Swedish Bar Association	No	No
Auditor	Supervisory Board of Public Accountants	Supervisory Board of Public Accountants	Yes	No
Estate Agent	The Swedish Estate Agents Inspectorate	The Swedish Estate Agents Inspectorate	Yes	No
Process serving companies	County administrative boards	County administrative boards	Yes	Yes
Independent legal professional (not employed by law firm)	Swedish Companies Registration Office	County administrative boards	Yes	No
Tax consultant	Swedish Companies Registration Office	County administrative boards	Yes	No
Accounting services	Swedish Companies Registration Office	County administrative boards	Yes	No
Auditing services	Swedish Companies Registration Office	County administrative boards	Yes	No

<sup>207</sup> The Bar Association is strictly speaking not an authority but a subject of civil law. However, the Association has legally been assigned the right to designate who is allowed use the protected title of "lawyer" as well as supervise these individuals.

<b>Financial Activities</b>	<b>Permit/notification authority</b>	<b>Supervisory authority</b>	<b>With checks in CRR</b>	<b>With checks in RSP</b>
Banking and financing operations, insurance operations, investment fund operations, securities trading, payment institution, electronic money institution, and consumer credit institution	The Swedish Financial Supervisory Authority	The Swedish Financial Supervisory Authority	Yes	Yes
Financial institutions (currency exchange and other financial operations)	The Swedish Financial Supervisory Authority	The Swedish Financial Supervisory Authority	Yes	No
Deposit-taking activities	The Swedish Financial Supervisory Authority	The Swedish Financial Supervisory Authority	Yes	No
<b>Debt collection and credit-reporting operations</b>	<b>Permit/notification authority</b>	<b>Supervisory authority</b>	<b>With checks in CRR</b>	<b>With checks in RSP</b>
Debt collection activities	The Data Inspection Board	The Data Inspection Board	No	No
Credit-reporting operations	The Data Inspection Board	The Data Inspection Board	No	No
<b>Environmentally hazardous operations</b>	<b>Permit/notification authority</b>	<b>Supervisory authority</b>	<b>With checks in CRR</b>	<b>With checks in RSP</b>
Car-scrapping operations	County administrative boards	Municipalities	No	No
Environmentally hazardous operations (in accordance with Chapter 9, Section 6, Swedish Environmental Code)	County administrative boards	County administrative boards	No	No

<b>Trade in certain goods</b>	<b>Permit/notification authority</b>	<b>Supervisory authority</b>	<b>With checks in CRR</b>	<b>With checks in RSP</b>
Weapons	Police authorities	Police authorities	Yes	Yes
Supply and export of military equipment	The Swedish Agency for Non-Proliferation and Export Controls	The Swedish Agency for Non-Proliferation and Export Controls	-	-
Pharmaceuticals	The Medical Products Agency	The Medical Products Agency	Yes	Yes
(Certain) used goods	Police authorities	Police authorities	No	No
Cash sales in excess of €15,000	County administrative boards	County administrative boards	Yes	Yes
Locksmith tools	Police authorities	Police authorities	No	No
Serving of alcohol	Municipalities (Statement required from the police authority)	Municipalities/Public Health Agency of Sweden	Yes	No
Wholesale trade of alcohol	Swedish Tax Agency	Public Health Agency of Sweden	Yes	Yes
Serving/sale of medium-strong beer	Municipalities	Municipalities	No	No
Retail trade of tobacco	Municipalities	Municipalities/the Police	No	No
Trade in untaxed tobacco products	Swedish Tax Agency	Swedish Tax Agency	Yes	Yes
Pawn brokering	County administrative boards	County administrative boards	Yes	Yes

<b>Manufacturing of types of goods</b>	<b>Permit/notification authority</b>	<b>Supervisory authority</b>	<b>With checks in CRR</b>	<b>With checks in RSP</b>
Manufacture of military equipment	The Swedish Agency for Non-Proliferation and Export Controls	The Swedish Agency for Non-Proliferation and Export Controls	-	-
Spirits, wine, strong beer, medium-strong beer, and other fermented alcoholic beverages	Swedish Tax Agency	Public Health Agency of Sweden	Yes	No
<b>Handling of certain hazardous goods</b>	<b>Permit/notification authority</b>	<b>Supervisory authority</b>	<b>With checks in CRR</b>	<b>With checks in RSP</b>
Explosives and flammables	Municipalities/Swedish Civil Contingencies Agency	Municipalities/Swedish Civil Contingencies Agency	Yes	Yes
<b>Sale of certain services</b>	<b>Permit/notification authority</b>	<b>Supervisory authority</b>	<b>With checks in CRR</b>	<b>With checks in RSP</b>
Sale of package tours (travel guarantee)	-	The Legal, Financial and Administrative Services Agency	No	No
Licensable activities according to Section 23 of the LSS	The Health and Social Care Inspectorate	The Health and Social Care Inspectorate	Yes	No
Licensable activities according to Chapter 7, Section 1 of the Social Services Act	The Health and Social Care Inspectorate	The Health and Social Care Inspectorate	Yes	No
Company services such as forming of limited companies	Swedish Companies Registration Office	County administrative boards	Yes	No
<b>Commercial traffic</b>	<b>Permit/notification authority</b>	<b>Supervisory authority</b>	<b>With checks in CRR</b>	<b>With checks in RSP</b>
Taxi operations	The Swedish Transport Agency	The Swedish Transport Agency	Yes	Yes
Commercial traffic	The Swedish Transport Agency	The Swedish Transport Agency	Yes	Yes

<b>Security operations</b>	<b>Permit/notification authority</b>	<b>Supervisory authority</b>	<b>With checks in CRR</b>	<b>With checks in RSP</b>
Security companies	County administrative boards	County administrative boards	Yes	Yes
Security officers	Swedish National Police Board/Police authority	Swedish National Police Board/Police authority	Yes	Yes
Alarm installation companies	Police authority	Police authority	Yes	Yes
<b>Rental operations</b>	<b>Permit/notification authority</b>	<b>Supervisory authority</b>	<b>With checks in CRR</b>	<b>With checks in RSP</b>
Car rental	The Swedish Transport Agency	The Swedish Transport Agency	Yes	Yes
Hotel/hostel	Municipalities/the police	Municipalities/the police	Yes	Yes
<b>Gambling activities</b>	<b>Permit/notification authority</b>	<b>Supervisory authority</b>	<b>With checks in CRR</b>	<b>With checks in RSP</b>
Automatic gaming machines, token gaming machines and slot machines	The Swedish Gambling Authority	The Swedish Gambling Authority	No (indirect control through alcohol permit)	No (indirect Control through alcohol permit)
Roulette, dice and card games	The Swedish Gambling Authority	The Swedish Gambling Authority	Yes	Yes
Certain gaming machines	The Swedish Gambling Authority	The Swedish Gambling Authority	Yes	Yes

## 11.6 SECURITY CLASSIFICATION AND REGISTRY EXCERPTS FOR WORK WITH CHILDREN

### 11.6.1 *Specific, conduct-assessed employment types*

Alongside the conduct assessment that applies for certain industries and occupations, there are also one such control measure for security-protected professions ('national security'), and professions that concerns children.

### 11.6.2 *Security-classified positions under the Security Protection Act*

Certain types of positions fall under the scope of the Security Protection Act<sup>208</sup>, which means that a particular conduct assessment with extensive registry checks is conducted before employment. Security-classified positions exist within both the public and private sector (e.g., within vital societal sectors such as electricity provision, radio and television and telecommunications). Prior to employment, a *security assessment* is performed in order to prevent “persons who are unreliable from a security standpoint from participating in activities of importance to national security” (Section 7). Security classification of employment occurs in three classes, where the level of information covered by professional secrecy and of extreme importance to national security that the employee may have access to is crucial (Section 17).

If a position is security-classified, registry checks are performed that includes searches in the Criminal Records Registry, Records of Suspected Persons and the Police’s general investigations registry (Section 12). Under the Security Protection Act, the Swedish National Police Board and the Swedish Security Service are provided a general power to seek out information on the person being examined which is stored within police databases (i.e., to not only perform searches in the registries referred to in the laws specified in the regulation.) For jobs in security class 1 and 2, registry checks can (in some cases) also include the spouse or partner of the potential employee. A special personal investigation involving an examination of the subject’s economic conditions is also carried out for jobs in class 1 or 2 (Section 18 of the Security Protection Act).

### 11.6.3 *Expanded requirements for registry excerpts with regard to work within activities concerning children*

Recently, the requirements of being able to produce excerpts from the Criminal Records Registry when working with children have been stressed in order to prevent the sexual exploitation of children (mainly due to the requirements of the UN Committee on the Rights of the Child and the EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography). To this end, obligatory registry checks of staff are set out in the Act<sup>209</sup> regarding registry checks of staff within pre-school activities, schools and child care, and in the Act<sup>210</sup> regarding registry checks of staff at care facilities or accommodation that take in children. Furthermore, since personal assistance became a licensable activity, similar requirements are set out for staff conducting work which falls

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208 1996:267.

209 2000:873.

210 2007:71.

under the scope of the Act<sup>211</sup> on registry checks for staff involved in certain operations directed at children with disabilities. Since September 18, 2013, registry excerpts are also required for persons working with children, according to the Act<sup>212</sup> on registry checks for staff who work with children, as part of the implementation of the EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography.<sup>213</sup>

In all cases, those seeking employment within these activities must personally request an excerpt from the Criminal Records Registry to prove their suitability.

## 11.7 SUBSIDIES, GRANTS AND SUBVENTIONS

### 11.7.1 *The Swedish welfare systems' economic benefits*

#### 11.7.1.1 Administrative authorities

The Swedish welfare systems provide a variety of benefits, which are administered and disbursed by a number of organisations and agencies. The most important include the Swedish Social Insurance Agency, the Swedish Pensions Agency, the Swedish Board for Study Support (CSN), the Migration Board, the Employment Service, the 29 unemployment insurance funds (SO, Swedish Federation of Unemployment Insurance Funds) and 290 municipalities.<sup>214</sup> Benefits are paid out in the amount of around SEK 520 billion per year from social security systems.<sup>215</sup> Of this total, it is estimated that around 4 per cent is incorrectly disbursed, i.e., about SEK 18-20 billion annually.<sup>216</sup>

About 80 per cent of payment transfers from these social security systems can be attributed to the social insurance fund, which is administered by the Social Insurance Agency and Pensions Agency.<sup>217</sup> Efforts to curb benefit fraud represent one of the areas in Swedish law characterised by a number of administrative measures, such as reclamation rules, thorough income inspections with information-sharing, and exclusion from unemployment insurance funds or denial of the right to compensation from the unemployment insurance funds.

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211 2010:479.

212 2013:852.

213 Bill 2012/13:194; European Parliament and Council Directive 2011/93/EU.

214 Swedish National Financial Management Authority 2011:11.

215 SOU 2007:45, p. 20.

216 SOU 2008:74, p. 13. These figures represent only a rough estimate, which is why the margin of error is high.

217 Report 7, FUT Delegation, p. 19.



### 11.7.1.2 Legislation designed to prevent erroneous payments

Undue payments of financial benefits from the welfare systems carry penal sanctions. The Benefit Crime Act<sup>218</sup> which entered into force in 2007 contains penalty provisions that are adapted to the specific conditions that exist for payments of allowances and other financial benefits. However, benefit fraud linked to business activity is covered by the fraud provisions of Chapter 9, Sections 1-3 of the Penal Code.

### 11.7.2 Tools and features

In terms of undue payments from these social security systems, there are some key tools and features with respect to crime. Some tools and features are only employed during certain types of social benefit fiddles, and are therefore described in the report for each benefit below.<sup>219</sup>

#### 11.7.2.1 Tools

Some of the tools used in crime are different forms of certificates such as medical certificates, employer certificates, income statements and payslips.

#### Medical certificate

Benefits which may be payable in case of illness, such as sickness benefit and sickness allowance, require a medical certificate stating the disease. These certificates can be issued consciously or unconsciously – partly by doctors deceived by patients simulating ailments, partly by doctors whose workload and stress means that they are unable to detect that the patient is exaggerating their symptoms, and partly by those doctors who actively assist in crime by deliberately issuing false certificates.<sup>220</sup>

#### False employer's certificates, income statements or payslips

In order to obtain an incorrect sickness pay-based income, sometimes false employer's certificates are used certifying that a person has a job with a good income. In cases where such a certificate is not enough to convince the Swedish Social Insurance Agency that a job exists, false income statements are sometimes also submitted to the Tax Agency. An income statement contains information on paid salary.<sup>221</sup> For this to be possible requires access to a business that can send out the income statements. Anyone who unduly tries to raise their sickness pay-based income can thus pay a business proprietor to obtain income

<sup>218</sup> 2007:612.

<sup>219</sup> Brå 2011b, p. 25.

<sup>220</sup> Brå 2011b, p. 30.

<sup>221</sup> Brå 2011b, p. 26.

statements, which for the entrepreneur represents the cost of the tax that, according to the income statement, is based on the salary that the beneficiary (wrongly) claims to have received. If the Social Insurance Agency asks additional questions, a false payslip can also be issued to give the impression that salaries have actually been paid to the “employee”.<sup>222</sup>

#### 11.7.2.2 Features

The *organiser* has the lead role in the large-scale tax or social benefit crimes, but often hides from the authorities. The *recipient* is the one who receives the incorrectly disbursed benefits, but need not necessarily be aware of the crime in the arrangement. The *assistants* (personal assistants) are central to the erroneous payments of attendance allowance, as the attendance allowance is channelled through their salary. Aside from the central role of the *doctor*, there are also *goalkeepers* who undertake personal payment liability against payment in bankruptcy, and *walkers* who assist in the process of turning “white” (reported) money in an account into off the books money in the form of cash.<sup>223</sup>

#### 11.7.3 *Economic benefits utilised in the context of economic and organised crime*

##### 11.7.3.1 Benefit fraud and administrative measures

The below-described economic benefits are examples of benefits that, to a greater or lesser extent, tend to be abused in the context of economic or organised crime. The purely *administrative* measures that can be taken to penalise undue payments include, for example, rules for *reclamation*,<sup>224</sup> *suspension* and *exclusion* (from unemployment insurance funds). In the case of suspected social benefit crime or fraud, possible criminal liability may also be found to exist.

##### 11.7.3.2 Unemployment-related benefits for individuals

#### Unemployment benefits

Unemployment insurance is a readjustment insurance that provides compensation during unemployment. The insurance is regulated in the Unemployment Insurance Act (ALF)<sup>225</sup> and handled by the social insurance funds in accordance with the Unemployment Funds Act (LAK)<sup>226</sup>. In order to be entitled to unemployment benefits, the employee must submit

<sup>222</sup> Brå 2011b, p. 26.

<sup>223</sup> Brå 2011b, p. 29ff.

<sup>224</sup> Rules for reclamation for an established undue payment are in place for the majority of the social insurance benefits, student financial aid and financial support paid by the municipalities. See SOU 2009:6.

<sup>225</sup> 1997:238.

<sup>226</sup> 1997:239.

an employer's certificate, a certificate of the worker's unemployment. There are several possible causes of undue payments, in particular that the unemployed person is in reality working and receiving a salary, reported or off the books.<sup>227</sup>

There are certain statutory opportunities for the unemployment insurance funds to prevent erroneous payments. The regulations of the unemployment insurance system contain three groups of measures for conduct that is not consistent with the conditions of the insurance. It involves situations when the applicant extends the period of unemployment, or when the applicant causes unemployment, or when the applicant mishandles their job-seeking activities. Each group of measures contains a ladder to show how serious it is to repeat actions that do not comply with the conditions of the insurance (Sections 43-43b of the ALF). The initial measures to be considered for one of the steps is a warning, and for the other two, suspension. Repeated negligence within each action ladder leads to a longer suspension period until at a certain time it means that the applicant must one more fulfil the employment condition. In addition to these measures, an applicant may, under certain circumstances, be excluded from membership of an unemployment insurance fund or be denied the right to compensation, see Sections 46-46b of the ALF and Sections 37-37b of the LAK. These measures, however, concern situations where an applicant has committed gross violations by submitting false or misleading information to an unemployment insurance fund.

As the unemployment insurance funds are member organisations, sharper sanction tools (exclusion) can be used in the event of undue payments than in the case of benefits in social security systems for which the state or municipality are responsible.

### **Wage guarantee**

Government salary guarantee refers to government payment of a worker's outstanding wage claims against an employer in bankruptcy. The compensation is regulated in the Wage Guarantee Act<sup>228</sup>. Causes of undue payments from the government wage guarantee include the fact that the stress level in the actual processing has increased as the number of reconstructions have increased. Furthermore, the lack of personal identity numbers or coordination numbers also constitute risks with regard to erroneous payments.<sup>229</sup>

### **Activity grant and development allowance**

Activity grants and development allowances support livelihoods in the context of labour market programmes, and are regulated by the Activity Support Ordinance<sup>230</sup>. The size of the activity grant is income-related and based on past income in the same manner as the

227 Swedish National Financial Management Authority 2011:11.

228 1992:797.

229 Report 7, FUT Delegation, p. 106.

230 1996:1100.

unemployment benefit. Common causes of erroneous payments are that the insured individual submits incorrect information about their income to the unemployment insurance fund, fails to inform the Employment Service and/or the unemployment insurance fund that he/she receives severance pay or pension, or submits otherwise incomplete information about their economy. According to Chapter 23 of the Activity Support Ordinance, a recipient of activity support can, if he or she has given rise to an undue payment through providing misinformation or otherwise, be obliged to repay the amount unduly paid.

### **11.7.3.3 Social security benefits**

#### **General information on administrative measures in the event of suspected or actual erroneous payments of social security benefits**

##### *Reclamation*

The Social Insurance Agency (or the Swedish Pensions Agency) shall order repayment of the social security benefits listed in the Social Insurance Code if the insured party, through providing misinformation or by failing to fulfil an obligation to notify or inform, has caused the benefit to be incorrectly paid out or paid in too high an amount (Chapter 108, Section 2 of the Social Insurance Code). In the case of maintenance support, the Social Insurance Agency decides on reclamation of the amount unduly paid, even if the conditions under Section 2 are not met.

##### *The possibility of making a house call and requesting certain information within the context of a case's processing*

The authority processing a social insurance case is obligated to ensure that the case is investigated to the extent that its nature requires (Chapter 110, Section 13 of the Social Insurance Code). In view of this and as part of the investigation, the legislature has given the processing authority the right to; make inquiries at the insured party's employer, doctor, provider of personal assistance or other party likely to be able to provide the necessary information; to visit the insured party; to request a special medical report or request that the insured party undergoes an examination; conduct other investigation as needed for the assessment of the compensation issue or in general for the application of the Social Insurance Code (Chapter 110, Section 14 of the Social Insurance Code). The general rule is that the insured party should be informed of the visits in advance, but unannounced visits can also be made in some cases.

## Relevant types of benefits

### *Sickness benefit*

Sickness benefit is part of the social insurance, and is a work-based benefit under Chapter 6 of the Social Insurance Code.<sup>231</sup> Sickness benefit is paid to gainfully employed persons due to illness. Everyone who is on sick leave for more than seven days must present a special medical certificate and employer's certificate. Among the causes of erroneous payments are false or inaccurate employer's certificates, false information about the scope of the work, and that the person on sick leave is in reality working (in practice, often unreported).

### *Sickness or activity allowance*

Individuals whose work ability is permanently reduced by at least one quarter during at least one year are entitled on medical grounds to activity or sickness allowance. Sickness or activity allowance is regulated in Chapter 32-38 of the Social Insurance Code. Entitlement to compensation requires a medical certificate stating the inability to work. Possible causes of erroneously disbursed sickness and activity allowance may include; that a person works too much in relation to the partial compensation, false medical documentation or an inaccurate work ability assessment.<sup>232</sup>

### *Attendance allowance*

Persons belonging to any of the three recipient categories in Section 1 of the LSS and requiring more than 20 hours of assistance per week in order to meet their basic needs (such as assistance with laundry, dressing, eating and communication), may be granted attendance allowance. The right to attendance allowance is regulated in Chapter 51 of the Social Insurance Code. To be eligible for attendance allowance requires documented medical evidence of disability. Attendance allowance is a relatively large item of expenditure in the welfare system.<sup>233</sup>

In cooperation with the police, prosecutors, Tax Agency and other agencies, the Social Insurance Agency has discovered massive fraud connected with attendance allowance.<sup>234</sup> Among the identified cases of undue disbursements, they found exaggerated or faked disabilities and exaggerated assistance claims, fraudulent time reports, and also cases of assistants not actually performing the certified work.<sup>235</sup> When it comes to attendance allowance, cheating often involves relatively large sums of money where salary costs are

<sup>231</sup> 2010:110.

<sup>232</sup> Swedish National Financial Management Authority 2011:11.

<sup>233</sup> Social Insurance Agency, 2013.

<sup>234</sup> SOU 2012:6, p. 160.

<sup>235</sup> Brå 2011b, p. 55.

subsidised or fully compensated; costs which rapidly grow in scale with the number of employees. The introduction of permit-requirements for assistance activities aimed at tackling fraud and other causes of erroneous payments of attendance allowance.<sup>236</sup>

#### *Parental benefit*

Parental leave benefit is a financial support that parents may request in connection with a child's birth or adoption. Parental leave benefit makes it possible for parents to be home with their children during long continuous periods by covering part of the income loss. The right to parental leave benefit is regulated in Chapters 11-12 of the Social Insurance Code. The possible causes of irregular payments are primarily income-related, such as misstated annual income or incorrect information regarding sickness pay-based income.<sup>237</sup>

#### *Temporary parental benefit*

The compensation that a parent is entitled to when staying home from work or refraining from seeking employment in order to care for a sick child is known as temporary parental benefit. The provisions on temporary parental benefit are found in Chapter 13 of the Social Insurance Code. Entitlement to the benefit, as a general rule, applies when the child is between 8 months and 12 years old. As requirements for medical certificates are only imposed after 8 days of continuous illness, the risk of the temporary parental benefit being misused is substantial. Common causes of erroneous payments of temporary parental benefit include that the child has actually been in pre-school/school/related recreational activities, that the parent has not been caring for the child, or that the parent has been home with a healthy child.

#### *Maintenance support*

If a parent liable to pay maintenance does not pay it, the party living with the child can apply for maintenance support from the Swedish Social Insurance Agency. The liable parent is then required to repay all or part of the disbursed maintenance support.

The right to maintenance support is regulated in Chapters 17-19 of the Social Insurance Code. For maintenance to be payable, the parents must be registered at different addresses. Among the most common causes of undue payments is false separation.

#### **11.7.3.4 Financial aid for studies**

Student financial aid is regulated by the Study Support Act<sup>238</sup> and managed by the Swedish Board for Study Support (CSN). The student aid, which is the most common form of

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236 SOU 2012:6, p. 19.

237 Report 7, FUT Delegation, p. 76.

238 1999:1395.

subsistence during higher studies, consists of a student grant (the grant component need not be paid back) and a student loans (to be repaid). Student aid may only be provided to those who actively study, and for a maximum of 240 weeks for third level studies. To continue to receive student financial aid, the student must present approved academic results from the previous term (Chapter 3, Section 6 of the Study Support Act). If a student has unduly received student aid or in an excessive amount, the erroneous amount must be paid back (Chapter 5, Section 1 of the Study Support Act). At the same time, the student aid is coordinated with other social security systems benefits, in that a student receiving student aid may not receive an activity grant or development allowance for participating in a labour market programme, sickness benefit, activity allowance or rehabilitation allowance under the Social Insurance Code (Chapter 3, Section 25 of the Study Support Act).

Students who receive student aid have an obligation to report changes in circumstances to CSN, which does not often happen. There can be several causes of this failure to fulfil the notification requirement. Errors resulting from non-adherence to the notification requirement, or notification being made too late in relation to the change having occurred, are commonplace.

#### **11.7.3.5 Subsidised employment – individual recruitment incentives and special support mechanisms**

The general recruitment incentives are intended to encourage employers to hire people with difficulties getting a job or who have been out of work for a long period of time. These are regulated by the Ordinance respecting employment subsidies<sup>239</sup>. The various forms of support are called Entry Recruitment Incentive, Special Recruitment Incentive, new start jobs and special new start jobs. The reason for the division into various forms of support is that they are aimed at groups that, for different reasons, have been out of the labour market for a long time (e.g., newcomers to Sweden, people who have been unemployed for a long time or on long-term sick leave). At the same time, the specific forms of assistance (wage subsidies, public sheltered public employment, security employment, development employment) endeavour to compensate for the reduction in work ability among persons with disabilities, and to enhance these people's capacity to obtain or keep a job. Questions about eligibility for such benefits are processed by the Employment Service, which also disburses approved benefits. Decisions regarding new start jobs are made by the Employment Service. A recipient of recruitment incentives is obliged to repay the amount unduly paid if he or she has given rise to an undue or excessive disbursement through providing misinformation or otherwise (Chapter 21 of the Ordinance respecting employment subsidies).

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239 1997:1275.

It happens that individuals and businesses misappropriate funds from the public in an unauthorised manner in the area of labour market policy. Individuals who are in need of assistance risk not receiving the support they need due to the Employment Service's resources being limited, while at the same time abuses can undermine confidence in the social security systems and lead to a distortion of competition in the labour market<sup>240</sup>. In terms of employer support, it relates in one respect to the situation with attendance allowance, insofar as salary costs are subsidised or fully compensated, which for a company with a larger number of employees immediately leads to significant (unduly disbursed) amounts. This in turn is one of the reasons for economic criminals' growing interest in these compensation schemes.

Against this background, the Government commissioned an official report in order to identify the extent to which abuses, overexploitation and other errors occur in relation to subsidised jobs, as well as to submit proposals on how such abuses can be prevented. This report will be presented no later than 31 March 2014.

#### **11.7.3.6 Income support**

Anyone who cannot provide for their own needs, or cannot have them provided for in another way, has the right to the assistance from the municipality in terms of their livelihood (income support) and for their way of life in general (Chapter 4, Section 1 of the Social Services Act). In order to be granted aid, the individual must provide information that proves they lack the ability to meet their own needs (such as account statements and bank statements, employment contracts, information on benefits granted by the Social Insurance Agency and Board for Study Support, information on fixed assets and personal property, etc.). If, through false information or failure to disclose information or otherwise, someone has caused financial support under Chapter 4, Section 1 to be unduly or overly disbursed, the Social Welfare Committee may reclaim what has been overpaid (Chapter 9, Section 1 of the Social Services Act). Erroneous payments can occur if the individual is working, conducting unregistered business or fails to report revenue in the business.

#### **11.7.3.7 Misuse of EU subsidies**

Within the EU there are a large number of grant and benefit schemes. About SEK 12 billion is annually paid out in Sweden as EU grants. Persons who, in violation of regulations or conditions, use such a grant or utilise such a benefit for a purpose other than that for which the grant or benefit has been granted will be convicted of *subsidy abuse* resulting in a fine

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240 An example of the potential for abuse is the compensation the employer can obtain in the case of new start jobs. Because this compensation is unlimited (no ceiling), it becomes possible for the employer to freely set the salary for those employed with wage subsidies. The worker and the employer can create a bank account specifically for this purpose, after which the employer can pay a small compensation to the employee and keep the remainder himself.



or imprisonment of up to two years (Chapter 9, Section 1 of the Penal Code). Control and payment of EU grants takes place at the local level (county administrative board in each county), which increases the potential for fraud through a reduced risk of detection. The number of reports of suspected EU fraud is low, although the number of reports has increased slightly in recent years. The Swedish Economic Crime Authority handles these types of cases and is also responsible for the coordination of national measures against fraud, abuse and other impropriety, and the inefficient management and utilisation of EU-related funds in the country.

#### 11.8 EXCLUSION OF SUPPLIERS IN PUBLIC PROCUREMENT

Swedish municipalities annually procure goods and services worth billions of Swedish kronor (SEK), but other administrative agencies are also subject to the legislation on public procurement. In total, the procurements of over one thousand agencies are covered by the legislation in this area, for which the Swedish Competition Authority is the central regulatory and procurement support authority. There is therefore a significant risk that companies, using offences against the law as competitive means, also adopt the position of tenderer in public procurements.

There is a national collaboration with the purpose of preventing public funds being used to pay unreported wages or being misused in other ways. Some municipalities have expanded their background checks on tenderers in order to promote fair competition and discourage unreported labour. Strict requirements are often imposed on tenderers within, for example, the construction industry, wherein they must be able to provide a report on who is working on a certain construction site.

Chapter 10 of the Public Procurement Act (LOU)<sup>241</sup> contains provisions for the exclusion of suppliers. A contracting authority shall exclude a supplier from participating in a procurement procedure if it is aware that the supplier has been convicted of a crime involving, for example, bribery and fraud.

There is also an optional exclusion rule which states that a supplier *may* be excluded from participation in a procurement if the supplier is in liquidation or has applied for bankruptcy / is bankrupt, has been put under receivership, is guilty of serious misconduct or convicted of an offence concerning professional misconduct, has not fulfilled their obligations with regard to social security contributions and taxes, or has failed to fulfil their duty of disclosure (Chapter 10, Section 2 of the LOU). It is the responsibility of the individual supplier to personally provide the contracting authority with the necessary excerpts from public registries in order to prove that there are no grounds for exclusion

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241 2007:1091.

(Chapter 10, Section 3 of the LOU). However, it is not possible for contracting authorities to perform searches on tenderers in the Criminal Records Registry.

Chapter 11 of the LOU presents additional examples of sorting and exclusion tools, but these provisions are more about requirements for the supplier's financial standing and technical and professional capacity, and less about the supplier's law abidance.

The Swedish Competition Authority states in its report on unfair competition in public procurement that contracting authorities should work with supervisory authorities to verify suppliers' compliance with rules, both at contract signing and regularly during the term of the agreement, and rely on these supervisory authorities' assessments of individual rule violations.<sup>242</sup> The Swedish Competition Authority also believes that the contracting authorities should reserve the right in their contractual terms to take legal action if the rules that apply for the performance of the contract in question are violated. The Government should also clarify that information and measures against unfair tendering should be a priority for the contracting authorities.

## 11.9 LEGAL PROTECTION AND RIGHT OF REVIEW

All administrative authorities are subject to the Administrative Procedure Act<sup>243</sup>, which imposes certain requirements on the processing of cases and grants certain rights to each individual who is a party to a case. An administrative authority shall process cases involving an individual as straightforwardly, quickly and fairly as possible, without security being neglected (Section 7). The party to whom the action is directed in the case may hire counsel (Section 9).

An applicant, plaintiff or other party has the right to access material added in the case, if this relates to the exercising of official authority against an individual (Section 16). The party is thus entitled to *insight* into the processing of the case, including information that formed the basis for a particular decision. The processing authority also has a *communicating obligation*, which means that the general rule is that a case cannot be settled without the person who is the applicant, plaintiff or other party being notified of information that has been added to the case by someone else, and being given the opportunity to comment on said information, if the case relates to the exercising of official authority against an individual (Section 17). Furthermore, as a rule the processing authority has a *duty to provide justification*, which means that a decision must include the reasons which determined the outcome, if the case relates to the exercising of official authority against an individual (Section 20). The authority is also responsible for *informing* the applicant of the decision (Section 21).

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<sup>242</sup> Swedish Competition Authority, 2013, p. 89.

<sup>243</sup> 1986:223.

A decision may be appealed by the person it affects, if this person objects to the decision and is granted leave to appeal (Section 22). The decision must be appealed to an Administrative Court (Section 22a). If an authority finds that a decision it has issued as the first instance is obviously incorrect, due to new circumstances or for any other reason, the authority shall amend its decision (review) if it can be done quickly and without detriment to any individual party (Section 27). If the decision cannot be reviewed on appeal, this authority shall submit the letter and other documents to the authority that will examine the case (Section 25 of the Administrative Procedure Act).

Found within the framework of the Swedish administrative process are Administrative Courts, which process and rule on appealed authority decisions. The Administrative Courts represent the first instance, the Administrative Courts of Appeal represent the appeal instance, and the Supreme Administrative Court represents the highest instance. The dispensation of justice in the Administrative Courts is regulated by the Administrative Court Procedure Act<sup>244</sup>. As a general rule, the administrative process is conducted in writing, unlike the general courts where the process is mainly verbal (Section 9). The Administrative Courts in general have a more extensive material process management obligation than the general courts, in which the court ensures that the case is as well investigated as its nature requires (Section 8). This is partly due to the Administrative Courts mainly reviewing authority decisions, thus constituting a guarantee that individuals' statutory rights are ensured and maintained in the relations between individuals and the public (in connection with the exercise of official authority). The expanded investigatory responsibility means that the individual in cases in Administrative Courts often lack the need for legal representation, which means that the space for the granting of legal aid or having expenses reimbursed in connection with litigation in Administrative Court is clearly more limited than in the general courts.

That one of the Administrative Courts' central purposes is ensuring citizens' rights in connection with the exercise of authority also speaks to the fact that a party, unlike in a civil litigation process, is not at risk of having to cover their own and the counter-party's court costs (or any legal fees of the counter-party), as the State has committed to fully covering the costs of a process undertaken in an Administrative Court.

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244 1971:291.

## 11.10 SECURITY MEASURES

### 11.10.1 *Civil procedure security measures*

#### **General information on civil procedure measures**

In the context of a civil dispute, there are certain civil procedure security measures in order to prevent the risk that the defendant will *sabotage a forthcoming enforcement (execution)*. For example, it is conceivable that the defendant will contest the claim solely to sabotage the enforcement.<sup>245</sup> These measures are aimed at maintaining the *object of enforcement* (or the applicant's claim under Chapter 15, Section 3 of the Code of Judicial Procedure) *in an unaltered state*, so that a future ruling, which involves the plaintiff's action being approved, may later be enforced.<sup>246</sup> The plaintiff is thus allowed plenty of time to develop their action without running the risk that the disputed object somehow gets lost. The mere *risk* of being subject to security measures discourages any thoughts the defendant might have of disposing of (or in some other way getting rid of) the object of enforcement before its dispute is settled. However, common to security measures under Chapter 15, Sections 1-3 of the Code of Judicial Procedure is the requirement that the applicant submits security to the court for any damages that may be inflicted on the counter-party (Chapter 15, Section 6 of the Code of Judicial Procedure).

#### **Sequestration at contentious claims**

The institution of sequestration is available both within the framework of criminal procedure (Chapter 26 of the Code of Judicial Procedure) and civil procedure (Chapter 15 of the Code of Judicial Procedure), but only the civil procedure part will be addressed below. Sequestration within the framework of civil procedure is regulated in two separate provisions. The first provision is aimed at cases where the subject of the dispute consists of a claim. In accordance with Chapter 15, Section 1 of the Code of Judicial Procedure, the plaintiff may request sequestration when probable cause is established to believe that he "has a claim that is or is likely to become the object of a trial or examination of another similar order, and there is reason to fear that the counter-party, through absconding, removing property or acting in some other way, will evade payment of the debt". Under these circumstances, the "court can issue a sequestration order to seize enough of the counter-party's property that the claim is likely to be covered in the event of enforcement."

If the creditor wins the case, the judgment can be enforced through seizure of the property for which the sequestration has been ordered.

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<sup>245</sup> Ekelöf, Edelstam & Bylund 2006, p. 11.

<sup>246</sup> Ekelöf, Edelstam & Bylund 2006, p. 12.

### **Sequestration in the case of alleged superior right to property**

Sequestration may also be used when the matter in dispute does not relate to a monetary claim, but instead relates to superior right to certain property. In accordance with Chapter 15, Section 2 of the Code of Judicial Procedure, “if someone shows probable cause to believe that he has superior right to certain property, that is or is likely to become the object of trial or examination of another similar order, and there is reason to fear that the counter-party will remove, substantially damage or in some other way dispose of the property to the detriment of the applicant, the court may order sequestration of the property.” For this form of sequestration to become a reality, the action must be based on the plaintiff claiming “superior right” to some of the counter-party’s property.

### **Ordering of appropriate action to secure the applicant’s rights**

According to Chapter 15, Section 3 of the Code of Judicial Procedure, when the applicant shows probable cause to believe he has a claim against another party, the court can also order *appropriate action* to secure the applicant’s rights. Such an action could entail the court, under penalty, issuing a ban that would prevent the counter-party performing a certain act or conducting certain business activities.<sup>247</sup> Alternatively, the court may appoint a trustee or issue a regulation which is in some other way likely to prevent any infringement of the applicant’s rights. In the numerous alternative measures that the court may order to secure the applicant’s rights, it can be considered an obligation on the side of the court to, in each case, choose the *mildest procedure* for the counter-party.<sup>248</sup>

#### *11.10.2 Other security measures*

### **Lien – a public-law coercive measure**

According to Chapter 46, Section 2 of the Tax Procedure Act, the Swedish Tax Agency may requisition the property of a person liable for payment in order to secure the payment of tax, charges, special charges or interest. Decisions on lien are made by the Administrative Court, on application by the Swedish Tax Agency. Decisions on lien may be taken if there is a real risk that the person liable for payment will not pay *and* the payment obligation relates to a significant amount (Chapter 46, Section 6). Although the payment obligation does not need to be established or charged, the lien is determined only when it is *probable* that the obligation will be established (Chapter 46, Section 7 of the Tax Procedure Act).

Lien is very similar to sequestration within civil and criminal procedure, but can be used by government agencies for certain types of claims (certain taxes, duties and charges). In the jurisprudential doctrine, it has been suggested that lien has longer-reaching legal

<sup>247</sup> Ekelöf, Edeltam & Bylund 2006, p. 13.

<sup>248</sup> Fitger, Comments to Chapter 15, Section 3 of the Code of Judicial Procedure.

effects than sequestration.<sup>249</sup> The reason is that, through various measures, a taxable person has a greater chance remove his property before this tax payment is due than the counterparty in a civil dispute.

### **Seizure of evidential matter – a coercive measure to ensure the preservation of evidence in cases of tax audit**

According to Chapter 45, Section 2 of the Tax Procedure Act, seizure of evidential matter refers to the following coercive measures; audit of the auditee's business premises, requesting and taking into custody of documents, as well as the sealing of premises, storage facilities or other spaces. If the auditee does not fulfil their obligations under Chapter 41, Sections 8-11 of the Tax Procedure Act (essentially, giving access to business premises and providing the required documents, as is deemed necessary during the audit), or a substantial risk of sabotage exists, an audit may be conducted in the auditee's business premises (Chapter 45, Section 3 of the Tax Procedure Act). In connection with the audit in the business premises, the requesting and taking into custody of documents may also be performed under certain circumstances, as specified in Chapter 45, Sections 4-11 of the Tax Procedure Act. Under certain circumstances, premises, storage facilities or other spaces may be sealed to protect documents to be examined or taken into custody for review (Chapter 45, Section 12 of the Tax Procedure Act).

#### **11.11 EVACUATION MEASURES IN ORDER TO MAINTAIN PUBLIC ORDER**

In Swedish law, there are limited possibilities to, through administrative measures, vacate or expropriate property, premises and areas in order to prevent the disturbance of public order. Preventing the disruption of public order does not constitute a valid reason to allow expropriation of property under the Expropriation Act<sup>250</sup>.

If an apartment is used for criminal activities or as a brothel, the right to use the apartment is forfeited (Chapter 7, Section 18 of the Tenant-Ownership Act<sup>251</sup> and Chapter 12, Section 42 of the Land Code). The housing cooperative or landlord is thus entitled to respectively evict the apartment owner or terminate the lease agreement early. However, these rights are only held by the cooperative or landlord. No authority can refer to these provisions as a basis to vacate a property. Until 1 March 2010, there was a special Acquisition of Rental Properties Act<sup>252</sup>, which in practice meant that a party intending to acquire

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<sup>249</sup> Lodin et al. 2011, part 2, p. 634.

<sup>250</sup> 1972:719.

<sup>251</sup> 1991:164.

<sup>252</sup> 1975:1132.

a rental property needed a special acquisition permit. The law was aimed at preventing rental property acquisition by rogue traders.

However, a person who leases an apartment in the knowledge that it is being used as a brothel or for gaming activities can be convicted of pimping or illicit gambling (Chapter 6, Section 12, and Chapter 16, Section 14 of the Penal Code).

Deployable statutory evacuation measures of a more administrative nature are found in the Police Act<sup>253</sup>, hence they can only be used by the Police. If for special reasons, it is deemed there is a risk of a crime involving grave threat to life or health or extensive destruction of property being perpetrated in a certain location, a police officer may vacate or prohibit access to a building, room or other location connected to this place in order to avert the crime or protect against it (Section 23).

In the case of serious disturbances of public order or safety, and if it is necessary to maintain order or safety, the Police can ban access to a certain area or space (Section 24). The legislative history shows that cordoning off areas has been a common and effective measure in preventing serious disorder and crime.<sup>254</sup>

An important explanation for the limited evacuation powers is that a large proportion of those potentially order-disrupting business operations that take place in premises (e.g. drug sales, brothels and gambling activities) are prohibited under Swedish law. The purchase of sexual services (Chapter 6, Section 11 of the Penal Code), pimping (Chapter 16, Section 14 of the Penal Code), illicit gambling (Chapter 16, Section 14 of the Penal Code), and all forms of manufacture, sale, possession and use of narcotic drugs (Section 1 of the Narcotic Drugs Punishments Act<sup>255</sup>), are criminal acts. These also represent crimes prioritised by both the Police and other authorities.

## 11.12 CONCLUSIONS

### 11.12.1 *Levels of industry regulation*

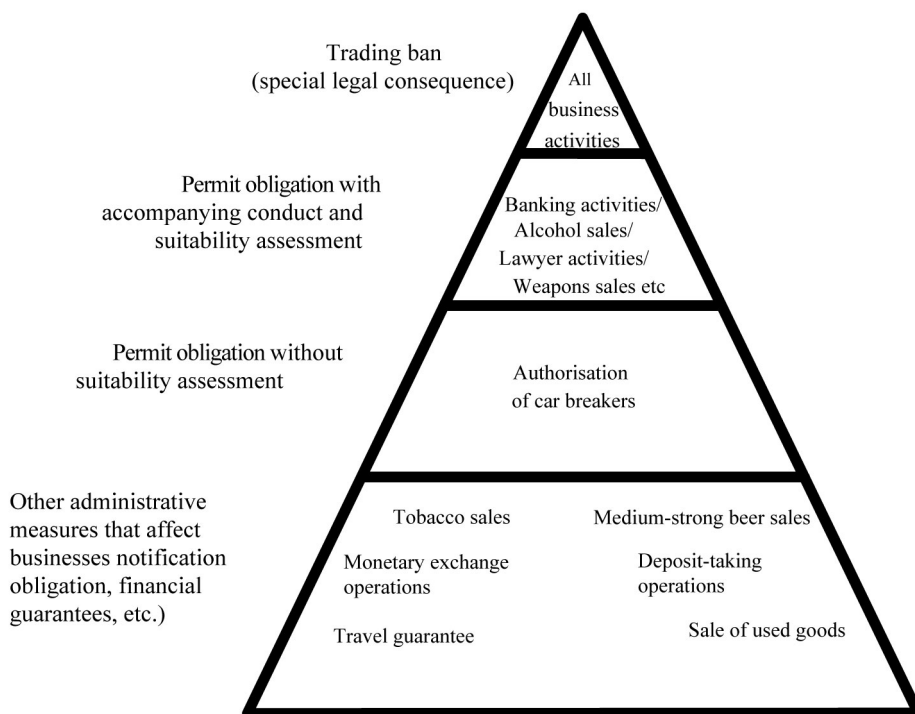
Figure 11.1 represents an attempt to schematically illustrate the differences in the level of regulation between the previously described business activities in terms of permits to conduct the business.

253 1984:387.

254 Bill 1996/97:175 p. 28.

255 1968:64.

**Figure 11.1 difference in level of business regulations**



The regulatory pyramid indirectly reflects the legislature's view of which business activities are most at risk of being abused. The scope of the administrative measures is therefore primarily dependent on the existence of economic crime within the industry in question, or whether the business activity otherwise poses a risk of crime or irresponsible enterprise. At the top is the ban on business activity, which admittedly is not an administrative measure but a special legal consequence of crime. The trading ban represents the most severe penalty to which a trader may be subjected. At the bottom of the pyramid are the business activities involving a notification obligation. In these cases, the legislature has held that a permit procedure has not been necessary for control purposes, but has judged that satisfactory control can be achieved with supervision, combined with certain personal control measures (e.g. during notification of the sale of medium-strong beer or tobacco, the trader is required to establish a personal control programme for the purpose of ensuring compliance with legislation in the area).

Under the trading ban, we find businesses where abuses can result in widespread damaging effects on society. Examples of well-established views include that the sale of



weapons and alcohol should be vigilantly controlled, and that it is important to maintain confidence in businesses of systematic importance such as banking and financing operations. It is thus no coincidence that they are high up in the regulatory pyramid.

From an approval perspective, it is possible to see to what extent a certain regulation is exclusionary. Notification obligation allows for the possibility of market access for all, while the permit requirement constitutes an examination of the applicant's suitability and previous good character.

On the other hand, the trading ban involves an absolute prohibition of business activity, *regardless* of industry. The permit obligation within a particular industry may however result in similar consequences for those who do not meet the requirements or who, during supervision, lose a previously granted permit due to negligence. The right to do business is lost and freedom of trade is curtailed. On a principle level, it is however possible to observe that the regulations are parallel-placed. Trading prohibition is based on the individual *trader's* lack of suitability to engage in business, while the permit requirement is based on a specific *business activity*. While there are conditions within a licensable *industry* that control who will get the opportunity to establish themselves within it, it is *society's* interest in a person refraining from business activity that is crucial to a trading ban being issued in an individual case.

#### 11.12.2 *Patterns of development*

It is difficult in Swedish law to see a coherent and consistent pattern of development in terms of administrative measures against economic and organised crime. This is mainly due to the lack of an explicit, coherent political line on administrative measures for crime prevention, which has never existed in the Swedish political debate. The administrative measures that have been introduced have primarily (sometimes exclusively) focused on the prevention of economic crime, while the work on organised crime seems to have largely remained a matter for the criminal justice system. There are however two exceptions. Asset-oriented law enforcement focusing on the re-appropriation of criminal gains, and the efforts against social benefit crime and benefit fraud, are both clearly aimed at organised crime, even though in practice they have a significantly wider spectrum.

All in all, however, the administrative measures palette has become more nuanced in recent decades. This is partly due to the consequences of economic crime for serious traders having increasingly become a topic of discussion, but also due to the fact that the changes which the Swedish business sector has undergone – such as the deregulation of public monopolies and the financial market, and EU accession – have had an impact on the relevant legislation. Below is an attempt to illustrate the parallel patterns of development that can be observed within the area of administrative measures against economic crime.

## **1. Increased use of conduct assessment for the operation of certain types of business activity**

Despite the fact that free enterprise still forms the backbone of Swedish commercial policy, the trend has been towards increased administrative measures, not least through conduct assessment, both with and without registry checks. Although the Commission against Economic Crime's trade permit system was never implemented, the 1980s saw an expanded conduct assessment introduced in commercial traffic and the restaurant industry. The design of the conduct assessment set the trend for the current alcohol legislation. Conduct assessment has also been introduced when applying for the arrangement of certain gaming activities under the Lotteries Act (e.g., roulette, dice and card games), which indirectly relates to the Alcohol Act's provisions on permits to serve alcohol. Furthermore, the conduct assessment has become gradually stricter for professions where great demands are placed on trust, such as estate agents (who have gone from voluntary authorisation to registration with suitability assessment) and to some extent auditors (supervision has been bolstered with the introduction of the Supervisory Board of Public Accountants). In previously non-competitive areas, conduct assessment has also come to be established, for instance when applying for the retail sale of pharmaceuticals, as well as in carrying out activities under the LSS (Act concerning Support and Service for Persons with Certain Functional Impairments).

There are several signs that the assessment of principals, owners and management of businesses in the welfare sector is, in general, moving in an inculcated direction. In a recent report the National Free School Committee proposed an extended assessment of school institutors' suitability in terms of conduct and financial conscientiousness.<sup>256</sup> At the same time, the investigator in the Ownership Assessment Commission has been commissioned to examine whether, within the welfare sector, just as in the financial sector, there is a need to ensure that owners and managements are responsible and competent and are engaged in long-term and high-quality business.<sup>257</sup> Among other things, a stance will be taken on whether requirements are to be imposed on a Board's or executive management's suitability, skills and composition.<sup>258</sup> A proposal was also presented recently for the introduction of mandatory registry checks for prospective family homes.<sup>259</sup>

## **2. Increased use of conduct assessment outside the business sector**

Another sign of increased conduct assessment with a view to crime prevention (primarily aimed at preventing sexual offences against children) are the laws on registry checks which have been added in recent years. This development has partly stemming from international

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<sup>256</sup> SOU 2013:56, p. 1.

<sup>257</sup> Dir. 2012:131, p. 1.

<sup>258</sup> Dir. 2012:131, p. 11.

<sup>259</sup> SOU 2014:3, p. 180.

conventions (e.g. the UN Committee on the Rights of the Child) and EU legal acts. On 18 December 2013, the Act<sup>260</sup> concerning registry checks entered into effect, which entails the right for employers to request that the individual provides an excerpt from the Criminal Records Registry if they want to be employed or perform tasks involving regular contact with children (the Act thusly also extends to volunteer assignments, such as sports leaders). Another example of conduct assessment aimed at protecting customers is the conduct assessment of taxi drivers, where a subsidiary aim of the examination is to prevent passengers from being exposed to violent crime. A discussion is currently being held at the Ministry of Health and Social Affairs in order to see whether an excerpt from the Criminal Records Registry should also be required of people working in elderly care and with the disabled.

An increased number of positions currently require the staff to be security-classified. A gradual extension of these positions has occurred with an emphasis on vital societal operations within the private sector, which consequently have been perceived as essential for ensuring national security.

Another sign of a general increase in the examination of the individual worker's conduct is that employers nowadays, even within industries without the statutory requirement of a registry excerpt for potential employees, also require the job seeker to request and produce a registry excerpt before a position can be considered. According to the Swedish National Police Board, a total of 222,940 requests were made for excerpts from the Criminal Records Registry in 2013, which represents just over five times the amount of excerpts during a ten-year period. On a principle level, it can be discussed whether this is a desirable development. If there is an implied requirement that a job seeker must bring a newly issued registry excerpt to every interview – and the person in question is registered in the Criminal Records Registry – this will mean an undermining of the principle that those who served a court sentence have atoned for their crime.

### **3. Stricter control of erroneous payments of grants and subsidies**

The fact that the prevention of erroneous payments from the welfare systems over the past decade has been a political priority is clear in the range of collaborative, investigative and legislative initiatives. These includes the Delegation on erroneous payments, the new Benefit Crime Act, the added official investigative reports on benefit blocking and administrative sanctions for observed benefit fraud and, in connection to this, a harmonised concept instrument regarding transfers from the welfare systems. The increased information-sharing between the welfare systems' administrating authorities and expanded reclamation rules are examples of administrative measures. Thus it appears that the status of administrative measures as crime prevention instruments in the subsidies area is strong,

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260 2013:852.

at least in relation to their position in other areas, where only a minor proportion of the legislative measures are of a criminal nature (for example, the Benefit Crime Act).

To a large degree, the legislation against benefit fraud impacts individual benefit recipients, but in many areas the administrative measures work to prevent economic crime in companies, such as the abuse of subsidised forms of employment or unreported work in combination with sickness benefit, unemployment benefit or sickness allowance. As just mentioned, measures against benefit fraud have also become part of the fight against organised crime.

#### **4. Consequences of EU accession**

EU membership also came to imply adapting certain trade permit regulations in order for them to harmonise with the EU law-decreed four freedoms (e.g., within the banking and financial sector, the auditing and commercial traffic industries). Within the banking sector, for example, previous legislation dictated that the Government only authorise banking business if the purpose could be considered beneficial to the public. For foreigners who were not Nordic citizens or who did not have permanent residence permits, permits were required to conduct any business in Sweden.

The requirements of risk-based customer due diligence to prevent money laundering and terrorism have also tightened requirements on the financial sector's transaction controls. The alignment with EU law should therefore not have had any significant impact on the Swedish trade legislation's crime prevention elements.

#### **5. Stricter regulations for public procurement**

Legislation, procedures and collaboration aiming to exclude rogue contractors from public procurement have been strengthened and intensified during the 2000s. Some municipalities have begun performing careful background checks on tenderers on their own initiative, while at the same time a lot of responsibility is placed on the tenderers to avoid undeclared work and uphold fair competition. In addition, the municipality imposes higher requirements on the tenderers, for example, that the same right to freedom of speech enjoyed by public sector workers must be granted to the tenderer's employees.

However, no background checks on the tenderers are performed in the Criminal Records Registry, which makes the exclusion of rogue bidders very difficult. In its report on unfair competition in public procurement, the Swedish Competition Authority states that there is a need for improved cooperation between different authorities to discourage companies from using offences against the law as competitive means.<sup>261</sup> The large number of actors in the procurement area places high demands on effective collaboration in order for public procurement regulations to be maintained. Actors include the following; the

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261 Swedish Competition Authority 2013, p. 39.

Swedish Competition Authority, which provides support in the procurement process and acts as the central supervisory authority; the Swedish Tax Agency, which works preventively against undeclared work in public procurement; the Swedish National Audit Office and the Swedish National Financial Management Authority, which in different ways examine agencies' use of tax revenue, as well as over one thousand contracting authorities.

## **6. Increased powers of fiscal control**

The Swedish Tax Agency's powers of fiscal control have gradually been extended and, in relation to trade authorisation and related supervisory control, represent an important complementary component in the palette of administrative measures. The Tax Agency's controls, and the data that emerges in connection to these, can be used by the supervisory authorities in order to make it easier to revoke a previously issued permit in connection with the on-going regulatory work. The Agency's on-going fiscal control of all business activities thus becomes a form of indirect supervision of all licensable operations. As a widespread occurrence of tax fraud (within a given industry) risks driving legitimate business operations out of the market, it is necessary to have an effective fiscal control in order to maintain competitive neutrality, which promotes serious business.

Examples of the expanded powers of fiscal control include the regulations regarding staff ledgers in hairdressing and restaurant businesses, which have recently been extended to include the laundry industry. In conjunction with this extension, the Government was instructed to submit a detailed proposal enabling the extension of the staff ledger system to later include the construction industry. Another example is that, from 1 January 2014, the requirement of cash registers also applies to market trading.

However, the report's proposal regarding monthly data on staff salaries, withheld preliminary tax and employer's contributions, has ended up far down on the priority list, despite the fact that its implementation would have a crime prevention effect.

## **7. Regulatory relief for limited liability companies**

Abolition of the requirement of auditors in smaller limited companies and the lowering of the capital requirement for limited liability companies is a move in the opposite direction to what has, at least to some extent, previously been perceived as crime prevention. The development of general requirements for companies therefore appears to move in slightly different directions.

## **8. Development of the trading ban – a key component of the administrative sanction battery**

An important crime prevention instrument in terms of Swedish law is the trading ban, which has been strengthened and expanded several times since the Trading Prohibition Committee Directive. The Directive emphasised that the extension of the rules on trading

prohibition is one of the methods that deserve to be considered for combating economic crime.<sup>262</sup> The perception was that the discussion on trading prohibition should be extended to include such crimes as systematic violations of tax and tax collection legislation or the legislation relating to industrial welfare, monetary exchange, environmental protection or unfair competition.<sup>263</sup> In the subsequent guidelines bill, trading prohibition was identified as a way to attack the rogue traders without making things more difficult for legitimate business owners (thus inhibiting the establishment of new businesses) through a comprehensive trade permit system. It was therefore argued in the bill that any increased demands on industry in order to prevent economic crime should be dealt in tandem with an expansion of the trading ban.

In this bill, which dealt with the Trading Prohibition Committee's proposal, it was recommended (in accordance with the report's proposal) that an independent law on trading prohibition would be introduced. Previously, the provisions on trading bans had formed part of the Bankruptcy Act, where a trading ban could *only* be issued when a trader failed to fulfil their obligation in connection with bankruptcy.<sup>264</sup> The same bill dealt with the trade permit system in critical industries as proposed by the Commission against Economic Crime which, as mentioned earlier, came to be implemented on a limited scale for a trial period in the restaurant industry and in commercial traffic.

What is important to note is that the bill emphasised that the proposals for an expanded conduct assessment and an expanded trading ban constituted *part of the fight against economic crime*.<sup>265</sup> The reasons for these (additional) proposals was thus *explicitly to prevent economic crime*. Furthermore, it should be emphasised that the trading ban – as a legal sanction – is something of a hybrid product in the legislative context. It is certainly a special legal consequence of crime, but the prosecutor can now, in some cases, request a trading ban outside criminal proceedings.<sup>266</sup> In addition, there is now a presumption that a trading ban will be issued when a trader has failed to fulfil payment obligations, committed an offence for which the minimum sentence is six months in prison, has been guilty of repeated significant crimes, or on several occasions over a ten year period has been involved in bankruptcies. The number of issued trading bans in relation to the number of active traders (registered companies) is still relatively low.

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262 SOU 1984:8, p. 64.

263 SOU 1984:8, p. 64.

264 Bill 1985/86:126, p. 1.

265 Bill 1985/86:126, p. 1.

266 For example, the prosecutor has a greater responsibility not to await a criminal investigation before he requests a trading ban in the case of repeated bankruptcies.

### 9. Is there a need in Sweden for administrative measures to prevent organised crime?

A problem in some countries is that organised crime infiltrates legal business activities. It happens in cases of potential criminal violence providing a controlled company with a monopoly on, for example, transportation, waste disposal or sales.<sup>267</sup> In this way, high prices can be maintained externally. A company controlled by organised crime may also, through the corruption of politicians and officials, usurp big contracts with the public sector. Through a lack of delivery of the contracted services and goods, the tax revenue, in reality, goes straight into the pockets of the criminal syndicates.

Administrative measures usually form part of the law enforcement when faced with these problems. Even in countries where the business world is not as mafia-infiltrated, administrative measures can be viable. In those cases it is often about discouraging prostitution and drug trade as well as related crimes such as illegal gambling and receiving stolen goods. What is characteristic of the administrative measures is that they target businesses and premises linked to the crime.

According to Swedish law, all dealings with narcotic drugs in any form is a criminal offence. This also applies to the use of narcotics. The Swedish drug policy is very strict and the penalties are therefore severe. Furthermore, the purchase of sexual services is a crime, as is pimping. The party who provides the premises for prostitution also risks being convicted of pimping. Alcohol legislation is also rigorous, rooted in the First World War rationing. Even games with money are carefully regulated. The need for administrative measures aimed at premises where prostitution, drug sales, alcohol sales and gambling takes place – for example, in the form of extensive evacuation powers – therefore seems to be limited in the Swedish context.

Put another way, the need for administrative measures is limited in Sweden, meaning measures designed to prevent organised crime having access to the legal infrastructure that running a business entails, as well as access to certain markets. The fight against serious organised crime constitutes a priority area, and is largely undertaken in collaboration with other agencies.<sup>268</sup> To the extent that administrative authorities are involved, it is for the purpose of mapping the assets of criminals.<sup>269</sup> To the extent that non-criminal (administrative) measures are used against organised crime, it appears to increasingly take place within the framework of on-going criminal investigations, and to a more limited extent, to deny organised crime access to the business sector's legal infrastructure. It then involves sequestration, lien and other asset-oriented measures. Besides forfeiture, the authorities are currently attempting to increase their grip on organised crime by re-appropriating criminal gains with the help of administrative measures. Associated administrative and

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<sup>267</sup> Jacobs 1994.

<sup>268</sup> Brå 2011b, p. 7.

<sup>269</sup> cf. Brå 2011a, p. 84; ISF 2011:12, p. 82.

asset-oriented measures include the review of grant decisions and the reclamation of erroneously disbursed subsidies.

In a Swedish context, however, there is a greater need for administrative measures to combat economic crime. One way to look at the situation is to try to answer the question of what it is that makes a particular industry attractive for economic and organised crime respectively. To simplify, from an economic crime perspective, *critical industries* that combine relatively low access requirements (in terms of education, professional skills and capital) with opportunities to make money through running a *rogue* business, particularly by failing to pay taxes and charges, and which do not follow others burdensome rules for business activity. Critical industries for organised crime are the individual companies *particularly* suited to being exploited as a criminal instrument for accessing direct payments, preferably by running a business to a limited extent. If offenders specialising in economic crime primarily circumvent regulations, actors within organised crime are more focused on appropriating money through fraudulent practices.

Expanded administrative measures can constitute an increased risk of detection, which in turn makes these industries less attractive for both economic crime and organised crime. Administrative measures against economic crime have the clear purpose of supporting legitimate business, while administrative measures with the express purpose of combatting organised crime are purely preventative in nature. In practice, however, such a theoretical division of motives is difficult to do. Additionally, the two types of crime tend to coincide – companies in *critical* industries (e.g. the construction industry) are often seen as well suited to being used as crime instruments by organised crime.

In its report on methods for administrative measures that impede serious organised crime, the National Intelligence Service (NUC)<sup>270</sup> bases its work on a more comprehensive definition of the term “administrative measure”. The definition also includes “such measures that may disrupt serious organised crime on a broader front and not only focus on individuals”.<sup>271</sup> Such a definition implies that the administrative measures flora becomes richer in its diversity, with the inclusion of measures other than those that focus on denial of access to business activity. Among other things, the report mentions the following; the Swedish Prison and Probation Service’s ability to limit an inmate’s authorised telephone and visitation time or to enforce his sentence in probation form; the Enforcement Authority’s ability to apply for conversion of a penalty to a prison sentence in the case of repeated non-payment; a police authority’s ability to deny a criminal suspect’s application for passport renewal and its work with aliens cases (refusal of entry or expulsion at external and internal border controls); and the Swedish Migration Board’s ability to revoke a resi-

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270 A national body composed of agency heads from several collaborating agencies that develops supporting data and situational overviews for effective inter-agency cooperation against organised crime.

271 National Intelligence Service 2012, p. 14.



dence permit when it has been based on deliberately submitted false information. It is somewhat doubtful whether these measures are contained within this report's definition of the "measure" concept, but with the NUC report's broader definition, one can well consider them administrative measures that can be applied in order to prevent and limit the harmful effects of organised crime.

If the narrower definition of administrative measures mentioned in Section 1.1 above is applied, the existing battery of measures seems to be primarily focused on the prevention of economic crime (which to some extent seems natural, as it is companies that have the widest interfaces to administrative regulations and authorities). There are many indications that, as far as Sweden is concerned, it will essentially remain this way.

### *11.12.3 The future of administrative measures for economic crime prevention purposes*

For a long time, the premise of the work to prevent economic crime in Sweden has been that it should act as *support* for serious traders (i.e., it should ensure that sound and fair competition on equal terms is maintained). Whilst the legislature has gradually intensified its work to prevent economic crime, it has been careful not to impose unnecessary demands or taxes on serious traders. Therefore, it is hardly surprising that rules blocking rogue entrepreneurs without creating extra work for the serious proprietors – such as the extended trading prohibition – gain public support. Nor should there be any objection from serious entrepreneurs to conduct assessment since it is directed at individuals who have committed crimes.

However, it would be of value, in light of the scope and structure of economic crime, to examine the degree to which various administrative regulations and controls address this criminality. This should create the conditions to establish an holistic approach in order to use administrative measures that make it possible, if necessary, to fill the gaps. For example, there is an apparent lack of existing measures targeting the construction and cleaning industries. Both industries are known for major problems with economic crime. The construction industry is also, in terms of size, one of the single most important industries in the country. Furthermore, control operations should be synchronised, where one single agency could also carry out control measures for other authorities' needs. The control measures could also be made more effective. If the requirement of monthly data for salaries, tax at source and employer's contributions is introduced, the staff ledger system in the restaurant, hairdressing and laundry industries can be abolished, and the Tax Agency can be given the general authority to, through field checks, reconcile the monthly data against those working at the individual workplace.

An overall review should make it possible to develop a coherent strategy for using administrative measures, particularly against economic crime.

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## 12 A LEGAL COMPARISON OF THE ADMINISTRATIVE APPROACH TO SERIOUS AND ORGANIZED CRIME IN THE EU

*M. Peters & D. Van Daele*

### 12.1 INTRODUCTION

There are numerous ways that the administrative authorities in the selected Member States can combat crime using tools other than traditional criminal law enforcement instruments. Intensive use of such instruments in the respective Member States could lead to a displacement effect across national borders, however.<sup>1</sup> During the empirical phase of this study, we indeed found indications of this displacement effect to Belgium owing to the use of administrative instruments in the Dutch border areas. This will be explored further in Part III of this report.

The existence of the displacement effect presumes cross-border cooperation between administrative authorities and/or other authorities. Insight into the varying national powers of administrative authorities is also necessary to facilitate cross-border cooperation in an administrative approach to crime.<sup>2</sup> Previous research has compared the neighbouring Member States of the Netherlands and Belgium,<sup>3</sup> but a detailed comparison of other EU Member States is still lacking. This chapter seeks to provide such a comparison. The main question is:

*What role do administrative authorities in EU Member States play in tackling serious and organized crime?*

One of the key underlying principles of an administrative approach to organized crime is ‘that the local authorities must play a major role in preventing and combating this type of crime.’<sup>4</sup> The administrative approach is complementary to and co-dependent on criminal law enforcement and thus relies on information exchange between criminal law enforcement

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1 Van Daele et al. 2010, p. 437.

2 Obviously, more elements are necessary to facilitate cross-border cooperation, such as an international institutional framework; see Chapter 14 for a detailed study.

3 Van Daele et al. 2010, p. 437ff.

4 Van Daele et al. 2010, p. 461.

authorities and government administrators.<sup>5</sup> It is important to note that an administrative approach to organized crime is not necessarily solely preventive in nature, nor is a criminal law approach necessarily repressive. For instance, administrative bodies can impose administrative sanctions or refuse permits based on previous offences. Additionally, investigative measures can be used before there is a formal suspicion, and criminal sanctions can be aimed at preventing crime.<sup>6</sup>

The purpose of this chapter is to contrast the key elements of the country reports from a comparative law perspective. The main sources for the comparison are the explorative country reports on the selected Member States. The country visits during the empirical phase of the study also deepened our understanding of local legislation. The comparison will result in a horizontal overview of the policies and tools employed in the selected Member States to combat crime by means other than traditional criminal law enforcement instruments.

The authors of the country reports were responsible for the content of their report. Several benchmarks were put in place before they began, with a view to creating some cohesion. These benchmarks included a definition of the administrative approach and subsequent sector-specific working definitions. We refer to the general introduction to this study. The authors were also encouraged to review the national peculiarities of their legal system, resulting in an overview of country-specific measures. During the empirical phase of the research, however, it became clear that the various authors differed in their interpretation of the term 'administrative approach'. For instance, some countries included money laundering and reporting suspicious activity in the administrative approach, whereas others did not. This uncertainty as to what 'the' administrative approach entails consequently filters through in the separate country reports, making it difficult to compare them, since they do not all cover the same instruments. Where possible and necessary, we conducted additional research to further substantiate the country reports for purposes of comparison. Where this was the case, the additional sources have been referenced. In some instances, the lack of information on a particular topic in a country report resulted in the exclusion of a Member State from that part of the comparison. Any mistakes or misinterpretations are in this comparison our own.

We begin by considering the general framework and policies underlying the administrative approach in the selected Member States (Section 12.2). We then discuss some general principles of administrative law (Section 12.3) and compare the various substantive instruments in-depth. This includes screening and monitoring when administrative authorities take a decision that influences a natural or legal person. It also encompasses the power to maintain public order. We further discuss the possibility of forfeiting criminal

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5 Van Daele et al. 2010, p. 461-462.

6 Van Daele et al. 2010, p. 461-462.

gains outside the scope of criminal proceedings and review country-specific measures where comparison is possible (Section 12.4). Third, we compare the legal protection of natural and legal persons confronted with these types of measures (Section 12.5). Finally, the legal framework assigns the responsibility for wielding the administrative instruments to various authorities. We therefore compare institutional frameworks and examine the current potential for cooperation between administrative and other authorities (Section 12.6). The final section (Section 12.7) presents our conclusions.

## 12.2 THE POLICIES IN THE SELECTED MEMBER STATES

Before comparing the detailed instruments that were the focus of the country reports, first, a general impression of the general policies, if there are any, on the role of administrative authorities in the approach against crime will be discussed.

The administrative approach to crime was first applied in New York in the 1980s, when Mayor Rudy Giuliani started to complement traditional law enforcement tools, such as wiretapping, infiltration and witness protection, with administrative tools to tackle the influence of ‘La Cosa Nostra’ in several economic sectors in the city.<sup>7</sup> Jacobs and Gouldin evaluated this approach and concluded that the application of traditional law enforcement instruments alone is insufficient to tackle crime.<sup>8</sup> The authors commented that the complementary application of regulatory powers and oversight of business sectors was ‘a great innovation in crime control’.<sup>9</sup> This ‘double strategy’ to fight organized crime<sup>10</sup> gained a foothold in the Netherlands in the 1990s and was thus introduced in Europe.

One of the starting points of this study was the following hypothesis: *‘There might not be a coherent or official policy supporting the use of administrative tools to tackle crime in the selected EU Member States. However, the actual tools, for example screening the criminal history of persons who are requesting an administrative decision from administrative authorities, do exist.’*

The country reports confirm this hypothesis. After all, a complete absence of such tools would have resulted in the absence of a country report. Without going into detail here, each of the selected countries has administrative instruments that could be used to prevent criminals from infiltrating the legal infrastructure. However, the question is whether there is a specific policy in the respective countries directed at using administrative tools to prevent serious and organized crime and, if such policies exist, what the underlying central concepts are.

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7 Van Daele et al. 2010 and Jacobs & Gouldin 1999.

8 Jacobs & Gouldin 1999.

9 Jacobs & Gouldin 1999.

10 Fijnaut 2010.

When it comes to having an expressly formulated policy or strategy on an administrative approach to crime, the Member States break down into three different camps. First, there are Member States that have established policies on using administrative instruments with the specific *goal* of combatting crime by administrative means. Most notably, this group includes the Netherlands and, to a lesser extent, Italy and England and Wales. Second, Belgium and the Czech Republic do implement initiatives suggesting an administrative approach to organized crime, but have developed less elaborate strategies. Third, several of the selected Member States have no discernibly coherent policy establishing an administrative approach to crime.

To elaborate on the latter, the absence of a common policy does not imply the absence of administrative instruments that could be used in any future administrative approach to crime. For instance, Sweden has around 230 laws regulating administrative supervision, involving 90 central governmental agencies and 290 municipalities that derive regulatory powers from these laws. Yet there is no common policy promoting the utilization of these administrative instruments against crime in Sweden.<sup>11</sup> Such a *smorgasbord* of different instruments and responsible authorities is also present in Poland, Spain, Germany and France, even though a common policy or strategy of using administrative instruments is absent in these countries. The institutional framework will be discussed hereafter. Nevertheless, the absence of a policy supporting an administrative approach to crime does not imply the lack of an overall strategy against serious and organized crime; such a strategy is upheld by all the selected Member States.<sup>12</sup>

Additionally, several Member States have policy-driven administrative approaches to crime. This includes the Netherlands, Italy, and England and Wales. These policies have in common that they are part of a broader national organized crime policy or strategy. They therefore offer more options for tackling crime than administrative instruments only. The instruments described in these policies are intended to complement traditional law enforcement, not serve as an alternative to it. The policies also have in common that they – among other things – aim to protect public bodies from infiltration or misuse by organized crime. Finally, these policies support cooperation and information-sharing among government bodies, as a practical measure and at different speeds. To elaborate and point out differences, the separate policies will be discussed below, moving from the least-implemented policy to the most-implemented one.

In England and Wales, the main policy instrument as developed by the National Crime Agency (NCA) focuses on serious and organized crime. The main goal of the current strategy is to reduce both the threat of crime and vulnerability to crime. The latter objective

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11 In the 1980s, legislators proposed introducing a trade permit scheme to protect industries vulnerable to economic crime, such as restaurants, transport companies and building firms. However, the proposal was never implemented.

12 Fijnaut & Paoli 2004.

includes reducing the vulnerability of the national and local government by protecting them from fraud, misuse of public procurement and bribery. The strategy emphasizes the 'whole government approach' to organized crime. As a consequence, it encompasses traditional law enforcement measures, fiscal measures, penal measures and administrative measures. Another consequence is the involvement of all sorts of government authorities and agencies, as well as the focus on information-sharing between those bodies. This policy is mainly meant to tackle organized crime, however, and it mentions each available instrument – or so it seems – that could help the authorities reduce crime. There is no tailor-made policy covering administrative instruments specifically, in other words; instead, those instruments are part of a pool of all sorts of different tools that can be deployed to disrupt organized crime activities in general.

Italy recently introduced the Anti-mafia Code, the *corpus iuris* for addressing mafia-type associations. The Code combines all legislative actions that have been undertaken since the 1960s into one legislative instrument. The Italian instruments are specifically aimed at organized crime. Historically, the main goal of this legislation was to prevent dangerous phenomena from infiltrating the public system. Nowadays, the focus is on banning persons suspected or convicted of organized crime from entering into contracts with public administrators. Contracting should be understood broadly as including tenders, licences, authorizations, subsidies and other administrative deeds supporting the economy. Apart from administrative tools, the *corpus* includes traditional law enforcement measures, criminalization of mafia-type organizations, preventive and repressive confiscation, and penitentiary sanctions. From a comparative point of view, the Italian policy is more focused than the policy in England and Wales because its aim is to prevent organized crime from infiltrating the public system, whereas the English policy aims to disrupt organized crime in general.

The Netherlands has the most developed and systematic policy concerning an administrative approach to crime. That policy is situated within the broader context of an integrated approach to organized crime. The integrated approach involves using law enforcement measures alongside fiscal and administrative ones. In short, it means that law enforcement, fiscal and administrative authorities apply the measures for which they have competence and when appropriate. It is a policy that assumes cooperation as well as information exchange between those authorities. The primary goal of the Dutch administrative approach, as part of the integrated approach, is to bolster and protect the integrity of government from misuse by organized criminals. More specifically, it is meant to prevent public bodies from unknowingly and/or unintentionally facilitating criminal activities. Historically speaking, the aforementioned New York double strategy gained a foothold in the Netherlands in the 1990s. A scandal involving police investigative tactics, the subsequent parliamentary enquiry and a study into the scope and forms of organized crime spurred

the development of the Dutch administrative approach.<sup>13</sup> The study by the Van Traa Committee revealed that criminal groups had infiltrated the illegal and legal economy of the City of Amsterdam.<sup>14</sup> This prompted the city to tackle crime systematically using both traditional law enforcement instruments and available administrative tools. These initial policies emphasized the range of options open to local administrative authorities to take action against crime and nuisance, such as screening of natural and legal persons applying for permits, subsidies or tenders. In the early 2000s the administrative approach became more and more embedded in national policy. The current national policy programme, *Nederland Veiliger* [Making the Netherlands Safer], prioritizes several organized crime categories, including human trafficking, drugs trafficking, money laundering, cybercrime and child pornography. Unlike the other selected countries (with the exception of Italy), the Netherlands has developed a complex legislative framework for screening and monitoring: the Public Administration (Probity Screening) Act (2002) (hereafter: BIBOB legislation).<sup>15</sup>

The third group of countries consists of the Czech Republic and Belgium. Here, an administrative approach to crime as such has been recommended at the national level but there has been no systematic implementation of any such policy.

Influenced by developments in the Netherlands, Belgium has considered the role of the administrative authorities in the battle against organized crime. In 1998, the Belgian Senate's Parliamentary Investigation Committee on Organized Crime recommended combating organized crime by looking beyond a criminal law enforcement perspective, in line with the *Organized Crime Action Plan* by the Belgian government and given that local, regional and federal administrators had their own set of responsibilities. However, almost twenty years later, little has come of these recommendations, although there are some notable local exceptions, for instance local initiatives in the city of Liège, which uses administrative measures to tackle motorcycle gangs,<sup>16</sup> as well as initiatives in Antwerp and Turnhout.<sup>17</sup> The practical implementation will be discussed in Part III.

The Czech Republic's national policy on organized crime references the need to use means other than traditional law enforcement measures, i.e. administrative measures. However, it merely refers to future possibilities and focuses mainly on administrative authorities sharing information with criminal law enforcement authorities. This is a starting point for a policy, but one that has not (yet) been implemented.

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13 Van Daele et al. 2010, p. 26.

14 Huisman et al. 2005, p. 1-2; Van Daele et al. 2010, p. 25.

15 Wet van 20 juni 2002, houdende regels inzake de bevordering van integriteitsbeoordelingen door het openbaar bestuur met betrekking tot beschikkingen of overheidsopdrachten (Wetbevordering integriteitsbeoordelingen door het openbaar bestuur), *Staatsblad* 2002, nr. 347.

16 Lecture by the *politiecommissaris* of the local police department of Midlim (Belgium) on 24 October 2014, attended in another capacity by M. Peters.

17 Interviews with the local police of Turnhout and the City of Antwerp.



Our conclusion is that policy in the EU on an administrative approach is being developed at different speeds. Some Member States have no policy at all on an administrative approach, others hint at the possibility, and still others have complex policies in place. The result is a range of different institutional and legal frameworks. With no strategy or policy to be seen, there is also no systematic implementation of legal and institutional frameworks. The implications of this will be discussed in the following sections.

### 12.3 THE LEGISLATIVE FRAMEWORK

#### 12.3.1 *The fragmented nature of the legislative framework*

The absence of policies discussed in Section 12.2 – i.e. policies meant to support an administrative approach to crime – has consequences for the legislative framework governing such an approach. Based on the country reports, we can divide our Member States into two categories according to their legislative framework: (1) a policy-driven legislative framework and (2) a non-policy-driven legislative framework.

The first category includes those countries that, acting on the above-mentioned policies, have enacted administrative legislation for the primary aim of tackling crime. These countries are the Netherlands with its complex BIBOB legislation, Italy with its Anti-mafia Code, and the UK, where administrative measures are part of the NCA strategy for combating crime.

Other countries have a legal framework that allows for the use of administrative measures to combat crime but do not see this as their primary aim. This is an important finding. The fact that there are measures, but that they are not primarily aimed at preventing criminals from infiltrating the legal infrastructure, makes sense within a context that lacks any systematic, coherent and implemented national policy. Countries that exemplify a non-policy-driven legal framework are Poland, Sweden, Belgium, the Czech Republic, Germany, France and Spain.

In general, a common feature of the legal frameworks in all the selected Member States is their subject-specific and therefore fragmented nature. Although the policy-driven frameworks are less fragmented than the non-policy-driven ones, they still consist of a patchwork of provisions. This is particularly true for England and Wales, which have no overarching legislation to support the above-mentioned policy. Instead, the main policy documents dictate a wide array of measures from which the authorities can ‘pick and choose’ in order to combat crime. Italy’s anti-mafia legislation provides the least fragmented body of legislation; the 2011 Anti-mafia Code is a *corpus iuris* that combines and updates all previous legislation. Nevertheless, other measures, such as the dissolution of a city council, are not regulated in the anti-mafia legislation. In the Netherlands, even though

the BIBOB Act was introduced as a general screening instrument for administrative authorities, the body of national legislation is still composed of several topical national, local and regional regulations and powers. There are separate laws pertaining to the supervision of legal persons, the screening of applicants for certain professions (such as taxi drivers), and the revocation of permits based on spatial plans. Licences can be revoked under the BIBOB Act.<sup>18</sup> Apart from BIBOB screening and monitoring, administrative authorities are also empowered to refuse or revoke a licence if it is clear that the applicant or licensee will misuse it for criminal activities.

The BIBOB screening procedure is therefore only used if and when it is unclear what an applicant intends with an administrative decision. Furthermore, the BIBOB's aforementioned complexity is partly due to its combining the screening and monitoring of applicants for several administrative decisions (on licences, subsidies and tenders) with the respective subject-specific administrative laws. These laws range from the Licensing and Catering Act and the Opium Act to the Environmental Permitting (General Provisions) Act, resulting in more than 15 different substantive administrative laws named in the BIBOB Act.<sup>19</sup> Finally, the Netherlands has separate legislation concerning public order. It is not idiosyncratic in this regard, as both Italy and England and Wales assign similar, separate powers to local administrative authorities, regardless of any overarching policies. In other words, the presence of overarching policies does not preclude the presence of a complex and fragmented body of law. The foregoing can be linked to the mainly subject-specific nature of substantive administrative law in general.<sup>20</sup>

In the country reports, this finding resulted in an overview of all sorts of subject-specific legislation that needed to be discussed. This was even more so for the non-policy-driven legislative frameworks because there was no general framework or policy that could be used as a structure on which to base the country reports. A fragmented legal framework is most common in the field of business regulation, such as the granting, revocation or refusal of licences, permits and subsidies. We can best explain this by giving an example.

In Poland, economic activities are divided into three categories of regulation: activities requiring a concession, regulated activities, and activities requiring a permit. Specific economic activities are then assigned to these three types of regulation. For example, trading in explosives and weapons falls under activities requiring a concession, whereas the production of alcohol and tobacco products falls under regulated activities. Distribution and retail of alcohol however fall under activities requiring a permit. These economic activities each have their own specific law, dictating the conditions under which they are regulated, the responsible issuing authority and the responsible monitoring authority.

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18 Article 1 BIBOB however refers to other administrative legislation.

19 This is further expanded by the 'Besluit BIBOB', for instance regulating public events.

20 Backaveckas 2014. See also Chapter 1 of this report.

Typically, they are economic activities that carry a risk of criminal involvement, such as the restaurant sector, the transport sector, the production of prescription drugs, prostitution, and so on.

Such a subject-specific legal framework for the regulation of economic activities can also be found in Sweden, Belgium, the Czech Republic, Germany, France, Spain and Belgium. Moreover, the fragmented nature of this framework is not limited to business regulation but also extends to certain professions, such as auditors, notary publics, lawyers, etc. Additionally, local authorities in some Member States are allowed to create local decrees or by-laws to regulate public order in their territory. That is the case in all our selected Member States.<sup>21</sup> The decrees cover a wide range of possible measures that can be implemented at the local level. Important for the purpose of this research is that the local decrees or by-laws can implement specific licences that must be obtained to exploit certain economic activities. Moreover, the local decrees can also encompass provisions penalizing (administratively or criminally) public order disturbances. They can also regulate specific phenomena for that territory, such as prostitution or gambling. The local decrees must be in concordance with higher regulations. Examples of such local decrees are the General Binding Decrees (GBDs) in the Czech Republic, the municipal police decrees in Belgium, police regulations in France, the *Allgemeinverfügungen* or *Ordnungsbehördliche Verordnungen* in Germany, and the *Algemeen Plaatselijke Verordeningen* in the Netherlands. These local decrees are used extensively in practice.

In conclusion, due to the nature of substantive administrative law, the instruments in the country reports are presented as a fragmented body of legislation, both subject-specific and territorial. A policy-driven framework does not necessarily prevent such a fragmented legal framework, although it assists in coordinating actions and identifying possible administrative measures.

### 12.3.2 *General applicable principles of administrative law*

In general, all selected Member States share certain principles of administrative procedure. These general procedural principles may be encompassed in a common national legislative framework, applicable to the substantive administrative laws, such as in Germany, the

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21 This possibility was explicitly mentioned in all the country reports, with the exception of Poland. After we contacted the Polish authors, they clarified that this is also a possibility in their country.

Czech Republic, the Netherlands, Sweden,<sup>22</sup> Spain,<sup>23</sup> Poland and Italy.<sup>24</sup> In other countries, such general principles are dictated by case law. This is true for Belgium, where the *Raad van State* stipulates general principles of administrative procedural law,<sup>25</sup> France, where the *Conseil d'Etat* has formulated such general principles,<sup>26</sup> and the United Kingdom.<sup>27</sup>

General procedural principles include the right to be heard during administrative proceedings, the right to information, the right to be notified of an administrative decision in the proceedings, the right to counsel, and the right to a timely procedure. The common framework usually also regulates the right to appeal. Unsurprisingly, most of these general principles can be traced back to Article 6 of the ECHR. The implications of these principles will be discussed in Section 12.5.

Apart from general administrative procedural regulations, most countries can issue administrative law sanctions in the event of an infringement of local administrative law. The most iconic example is the German *Ordnungswidrigkeitengesetz*, which allows fines if administrative law is violated. There is a detailed comparative study edited by Oswald Jansen (2013) on sanctions in the European Union, including a comprehensive comparison and country reports on eight of the selected research countries in this study.<sup>28,29</sup> We must also mention the report by Metselaar & Adriaanse (2014), which comprises a quick scan of the cross-border recovery of administrative fines in Belgium, Germany and the United Kingdom.<sup>30</sup>

Finally, each selected Member State basically adheres to the principle of a free economic market. In the reports, some countries explicitly mention this as a leading principle for economic activities (Poland, Germany, the Czech Republic, Spain, France and Sweden).<sup>31</sup> In some countries, that principle is constitutionally embedded (Sweden, Germany, France). It encompasses the concepts of equality (Poland, Spain), proportionality and necessity (Spain) in relation to measures that curb economic activity.

Due to the economic crisis, bureaucratic restrictions on the economic market have been lifted in some Member States, simplifying access to business activities (Spain),

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22 See: Blanc-Gonnet Jonason 2013, p. 565ff. Interestingly, Paliero (2013) classifies Sweden as a country lacking a general legal framework, even though Blanc-Gonnet Jonason (2013) identifies a general administrative procedural law. This might be a consequence of Paliero's decision to only include the framework on administrative sanctions.

23 See also: Paliero 2013, p. 23-24.

24 Bernardi, Grandi & Zoda 2013, p. 291-292.

25 See also: Paliero 2013, p. 25-26 and Put & Andries 2013, p. 104ff.

26 See also: Breen 2013, p. 209-210.

27 See also: Paliero 2013, p. 25-26 and McEldowney 2013.

28 Excluding Poland and the Czech Republic.

29 Jansen 2013; for a critical review of the research, see: Bröring 2013.

30 Metselaar & Adriaanse 2014.

31 Even though other reports do not explicitly mention the principle, this does not imply that a free market does not exist. As the selected countries are all members of the EU, the existence of (and adherence to) this principle may be assumed.

introducing new legislation – for instance concerning ‘whitelists’ for companies – or relaxing the supervision of access to the free market (Italy).<sup>32</sup> Some countries have experienced a rise in organized crime stemming from the transition from a communist regime to an open market, in connection with the open borders introduced by the Schengen *Aacquis* (Czech Republic).

The principle of a free market is important in the administrative approach to crime. Economic activity can only be restricted when explicitly provided for by law (Poland, Germany, Spain) and when doing so entails the protection of essential public interests, such as human life, health and safety (Poland, Sweden, Germany, Spain). Thus, as long as the law does not impose limitations, business activities can be performed freely. This does not mean that there are no general requirements for conducting business, such as corporate taxes and capital requirements (Sweden). The risk of criminal activity can also trump the principle of the free market (Sweden again).

### 12.3.3 *Economic sectors*

All of our selected Member States regulate certain economic activities or business sectors, be it by licences, tenders or subsidies. These sectors are – as explicitly indicated in the country reports – regulated for several reasons. Certain sectors are, for example, important to the national economy (Poland); it is important to maintain certain professional or other quality standards in a sector (Poland, Sweden); and certain sectors are vulnerable to criminal influences (the Netherlands, Poland).

It is important to note that the country reports differ in the way they have listed regulated sectors. Some reports discuss the most relevant sectors (e.g. Sweden, Spain, Poland) while others reviewed the overarching system and gave examples from certain sectors (e.g. the Czech Republic, Italy, Belgium, Germany, France and the Netherlands). The overview below is therefore not comprehensive. Nevertheless, it does indicate which sectors are seen as ‘risky’ in the selected Member States. The overview only lists sectors that are regulated by more than one Member State. For the full overview, please see the country reports.

The following economic sectors were listed in all the country reports.

- *the hotel, restaurant and bar sector*
- *the gambling sector*

Moreover, some country reports discussed the following economic sectors, which are regulated in some way by the selected Member States. This includes sectors in industry,

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32 Interview at the Prefecture of Milan, 25 September 2014.

but also sectors which provide services to the public, sectors authorized to trade in hazardous products, as well as public and private professions:

- production of alcohol products (Poland, Sweden)
- production of prescription drugs (Poland, England & Wales<sup>33</sup>)
- waste collection and processing (Poland, Sweden, Italy)
- the building sector (Germany, Italy, Sweden<sup>34</sup>)
- distribution of alcohol products (Poland, Belgium, Sweden, the Czech Republic)<sup>35</sup>
- currency exchange offices (Poland, Sweden, Spain)
- the banking sector (Poland, Sweden, Spain, the Czech Republic, France, England & Wales)
- credit reporting operations (Sweden, Germany, the Czech Republic)
- the prostitution sector<sup>36</sup> (the Netherlands, Germany, Belgium, France, the Czech Republic)
- the real property sector (Sweden, Germany, the Netherlands)
- persons working with children (Poland, Sweden, Spain, England & Wales)<sup>37</sup>
- the (private) security sector (Poland, Sweden,<sup>38</sup> Germany,<sup>39</sup> Spain, England & Wales)
- lawyers (Sweden, Spain, the Czech Republic,<sup>40</sup> England & Wales)
- police personnel (Spain, England & Wales)
- auditors (Sweden, Spain, the Czech Republic)
- penitentiary staff (Spain, England & Wales)
- notaries (Spain, the Czech Republic)
- taxi services (Sweden, the Netherlands, Spain, England & Wales)
- commercial (goods and passengers) transportation (Sweden, the Netherlands, Spain)
- trade in explosives, firearms and ammunition (Poland, Sweden, the Czech Republic, England & Wales, Italy)
- trade in used goods (Sweden, Germany)
- public events (the Netherlands, the Czech Republic).

Last, peculiar to the Netherlands are the Dutch *coffeeshops*. Contrary to what their name suggests, these shops sell marihuana and hemp products. The Netherlands condones the selling of small amounts of soft drugs,<sup>41</sup> but the *coffeeshop* sector is also regulated by

33 Implementations of Regulations 2004/273/EC and 2005/111/EC.

34 The Nacka project, including the inspection and supervision of building sites, was discussed in the interviews.

35 This is linked to the hotel, restaurant and bar sector. In the countries listed, it was a specific licence.

36 If legal and/or regulated.

37 Based on Directive 2011/92/EU.

38 Also includes alarm installation companies and locksmith tools.

39 Including lock and key services.

40 Defined as 'bar members'.

41 A common misconception is that drugs are legal in the Netherlands. This is untrue; soft and hard drugs are illegal under the Dutch *Opiumwet*. However, Dutch public prosecutors condone, i.e. do not prosecute, under

administrative procedures. The sector is a hot topic of discussion in the Netherlands and elsewhere due to its vulnerability to organized and other crime.<sup>42</sup> Moreover, it attracts considerable (and unwanted) drug tourism from other EU Member States and beyond.<sup>43</sup>

Obviously, the procedures and the scope of screening differ. In the following sections, we compare the manner in which the Member States regulate these sectors.

#### 12.4 SUBSTANTIVE INSTRUMENTS IN THE ADMINISTRATIVE APPROACH TO CRIME

This section discusses the substantive instruments described in the country reports on the selected Member States. The purpose is to compare the different applicable provisions and identify common characteristics and exceptions. It was not our intention to rehash the country reports. Readers who are interested in the specific situation in one or more Member States should refer to the reports in Chapters 2 to 11. Before continuing our discussion, we must mention that we made no distinction between regulations pertaining to natural persons and regulations pertaining to legal persons, unless necessary due to distinctive applicable law.

##### 12.4.1 *Screening and monitoring instruments*

*Say I am the wife of a known Hell's Angel member, and I want to open a restaurant and apply for a licence. Is there any way for you to screen me and the people I am involved with to ensure that my licence is not misused for criminal purposes, for instance money laundering?*<sup>44</sup>

In the scope of business and economic activities, government authorities can be allowed by law to screen natural and legal persons before permitting them to engaged in said activity, for instance by granting a licence, concession, permit or issuing some other positive decision. One of the main goals of this research focused on whether such preventive instruments for screening and monitoring natural and legal persons exist in the selected Member States in the context of administrative decisions. In this section we will answer this question from a legal point of view. Part III of this study discusses the practical application of these measures.

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strict policy regulation, the sale and use of small amounts of soft drugs, which has led to the rise of *coffeeshops*. See for instance Bouchard, Decorte & Potter 2013.

42 Bouchard, Decorte & Potter 2013.

43 Van Ooyen-Houben, Bieleman & Korf 2014.

44 This hypothetical situation was presented to almost all of the persons interviewed in the scope of this study.

Our first and foremost finding is that the selected Member States all have instruments that allow the administrative authorities to screen persons before they enter regulated sectors. The power to screen or monitor and subsequently refuse or revoke an administrative decision puts serious restrictions on the freedom of economic activity. That is why in all the countries reviewed, national law regulates these powers in order to protect significant public interests. In Poland and the Czech Republic, they are even regulated by the relevant Constitutions. However, these screening instruments differ in their purpose, scope, sector, object, subject, procedure and the information sources that can be accessed.

One important detail is that not all screening instruments are tailor-made for an administrative approach. This is linked to our earlier findings, discussed in Section 12.2, concerning the absence of a policy-driven approach in most of the selected Member States. Consequently, we can make a sharp distinction between screening instruments aimed at regulating economic sectors in general and screening instruments aimed at preventing misuse of sectors by criminals.

All the Member States have instruments meant to regulate sectors. These licensing, subsidy and tender procedures are not aimed at preventing crime directly. Instead, they are intended to regulate a specific sector or sectors by creating hurdles for persons who are not wanted in the sector because of their professional or personal background. However, in doing so, these instruments have the indirect effect of excluding persons with a criminal background and thus indirectly preventing criminals from misusing the sector. An example of this is the certificate of good conduct. Persons may be required to obtain this certificate before entering a professional field or applying for a licence. As aptly worded with respect to the DBS checks in England and Wales, such instruments are meant to ‘help governments make safer decisions’. Thus, certificates of good conduct are meant to regulate economic sectors, but in doing so can exclude criminals from entering those sectors.

On the other hand, there are also instruments created specifically to prevent criminals from misusing the legal infrastructure. In the selected Member States, only two real examples of such legislation exist, found in the most policy-driven countries. First of all, the Anti-mafia Code in Italy aims to prevent natural and legal persons from contracting with or benefitting from the public administration system in any way if they have been convicted of certain offences or if mafia infiltration can actually be established. Second, in the Netherlands the BIBOB Act aims to prevent public authorities from unintentionally facilitating criminal offences by granting permits, licences, tenders or subsidies in certain sectors. These types of legislation are specifically meant to prevent criminals from misusing the relevant economic sectors.

Instruments that regulate sectors and instruments that aim to prevent criminals from misusing the legal infrastructure exist alongside each other, even in the policy-driven Member States. For instance, in the Netherlands licences can be refused on the basis of sector-specific laws, such as the Environmental Licensing (General Provisions) Act, aimed



at regulating spatial planning. Also, a refusal to issue a Dutch certificate of good conduct (VOG) can prevent persons with a certain criminal background from entering a certain professional field.

However, the BIBOB Act also applies to several sectors and administrative decisions.

The foregoing reveals the complex reality of the selected Member States, with different types of screening instruments for different aims co-existing in a single legal system. This complexity is heightened by the following observations. Some screening instruments limit themselves to only one sector and one administrative decision, for instance the licensing procedure for casinos in Poland or Belgium. However, other instruments are applicable to multiple sectors and involve different administrative decisions, such as the certificates of good conduct in the Member States, the Anti-mafia Code in Italy, and the BIBOB legislation in the Netherlands. Moreover, in actual screening practice, these instruments can be used consecutively.

It is worth mentioning that this exploratory study's definition of preventive screening and monitoring instruments posed something of a challenge when it came to our comparison. As a starting point, we divided the screening instruments into administrative decisions concerning licences, subsidies or tenders, based in part on the Dutch BIBOB Act. Since we had almost no knowledge of the instruments used in other Member States and how they are applied, it was logical to use the BIBOB Act as a starting point. As we began writing this chapter, however, it soon became clear that we needed to deviate from this division. This made the comparison somewhat challenging, but at the same time highlights the beauty of exploratory research.

Below, we discuss the instruments used in an administrative approach to crime. These instruments are categorized by scope, ranging from broad to limited. We therefore begin by discussing instruments that overarch economic sectors and/or administrative decisions (Section 12.4.1.1). We then turn to the screening of persons in the scope of licences (Section 12.4.1.2), subsidies (Section 12.4.1.3) and public procurement (Section 12.4.1.4). Last, we look at the options for prohibiting trade (Section 12.4.1.5).

#### **12.4.1.1 Overarching screening instruments**

In this section, we look at those screening instruments that can be applied to more than one sector or administrative decision in the selected Member States. The latter includes the option of screening in the context of licences, tenders and subsidies. We will start with the broadest but least invasive instruments, i.e. certificates of good conduct, and end with overarching instruments that aim to prevent criminals from infiltrating the legal infrastructure, i.e. the Anti-mafia Code and the BIBOB Act.

#### 12.4.1.1.1 *Certificates of good conduct*

Many administrative decisions, e.g. a business licence or permission to enter a certain profession, require the applicant to submit a 'certificate of good conduct'. This usually involves screening the applicant's criminal background by requesting the relevant register for a certificate. In this manner, public authorities indirectly access information on an applicant's criminal history. Such a certificate can be part of a larger screening procedure, for example for licences, or it can be a stand-alone requirement. Some of the selected Member States allowed certificates of good conduct to be requested in the scope of an administrative decision.<sup>45</sup>

Most selected Member States provide for a 'certificate of good conduct' (the Netherlands, Spain, Germany, the Czech Republic, England and Wales and to some extent Sweden and Poland). The other reports did not mention a standardized certificate of good conduct.

A certificate must be requested for specified activities. Some countries, such as the Netherlands, Spain, the Czech Republic and England and Wales, allow for such certificates in a broad range of areas, including professions, licences, business activity and tenders. The relevant country reports provide a more complete list of all such areas; suffice to say here that the aforementioned countries all require persons working with children to submit an excerpt from their criminal record with their job application. This requirement is based (albeit implicitly) on Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography. Other countries, in this case Sweden and Poland, only require an applicant to provide an authority with an excerpt of their criminal records in specified situations, mainly employment. In other situations where the law requires the person to be of 'good conduct', criminal records are assessed as part of the licensing procedure, allowing the authority to check the records directly. In all countries, the persons checked can be either natural or legal persons.

A certificate of good conduct is usually issued after a background check (i.e. a check of the person's criminal record). In the Netherlands and England and Wales, this includes access to police information and police investigations where necessary. Other countries, such as Spain, only allow for a check of the Criminal Registers, which contains only judicial information. Separate checks do exist in the Czech Republic and England and Wales, ranging from basic to more extensive screening, based on the applicable law and the information that can be accessed in that Member State. For instance, in England and Wales it is possible to check local police information and lists banning certain persons from engaging in certain professions when the individual concerned is applying for a taxi or private hire vehicle licence, which requires a certificate.

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45 While other reports do not mention such certificates, this does not necessarily mean that they do not exist in these Member States. Here, we discuss only the certificates that were explicitly mentioned in the reports.

Whether it is the applicant in question who has to provide the certificate or whether the authority requesting the certificate can access the relevant information itself differs from one country to the next. In the Netherlands and Spain, the applicant provides the certificate at the authority's request. In the Czech Republic, a transition to 'e-government' has made it possible for the authority to request a certificate from the Penal Register. The content of the certificates sent to the administrative authorities ranges from a 'blank' certificate if no impediments have been found in a person's criminal history (the Netherlands and Spain) to excerpts from the criminal records (the Czech Republic, England and Wales, Sweden and Poland).

The authority requesting the certificate decides whether to exclude the applicant from a certain activity. In Spain and the Netherlands, the decision is based on the activity for which the application was submitted and whether the person's criminal record provides cause to prevent his or its engagement in such activity, i.e. because he/it would represent a risk to society if allowed to perform that activity. For instance, a conviction for drink driving may prevent a person from obtaining authorization to drive a taxi. This would not necessarily be the case if that person had been convicted of fraud.

Peculiar to England and Wales is that the authority providing the certificates, the Disclosure and Barring Service (DBS), is in fact a semi-private company.

Finally, the relevant legislation in some Member States explicitly allows for the submission of certificates from foreign countries. This is the case for England and Wales and the Netherlands. During our country visits, it became clear that this would also be allowed in Italy and Sweden. In our opinion, certificates of good conduct, either as a 'blank' form or an excerpt from the criminal records, offer a good starting point for screening foreign persons and companies, especially if the natural or legal person's domestic legislation allows him to obtain the document himself. Another option would be to use the provisions in ECRIS allowing for the exchange of information on criminal records for administrative purposes.<sup>46</sup>

#### *12.4.1.1.2 Invasive overarching screening instruments*

It is no coincidence that the Member States that are most policy-driven also have overarching instruments for screening. These instruments are Italy's Anti-mafia Code and the Netherlands' BIBOB Act. We compare these two instruments in detail, separately from the other screening and monitoring instruments, for the following reasons. First, they are the only real policy-driven instruments, focused on preventing criminals from misusing the legal infrastructure. Second, they apply to multiple economic sectors and administrative

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46 We refer to Section 12.4.4 of the report on the potential for information exchange in Europe for administrative purposes. This section describes the potential for information exchange for administrative purposes via the ECRIS channels, if provided for under the national law of the relevant Member States.

decisions, making them difficult to compare with instruments that focus only on one sector or one type of administrative decision.<sup>47</sup> Our detailed review in this section will support our comparison in the following sections, which focus on the types of administrative decisions, i.e. licences, subsidies and tenders.

Pursuant to the Anti-mafia Code, legal and natural persons subject to a preventive measure or convicted of participation in a mafia-type organization, kidnapping for ransom or drug trafficking cannot obtain any kind of subsidy, concession, licence, tender, police authorization or other financial contribution from Italy's public administration. In practice, however, the instrument mostly concerns contracting with local government.<sup>48</sup> The instrument is divided into three tiers. The first tier consists of low-value contracts, which are exempt from screening. Contracts under EUR 150,000 are not screened. The second tier requires the screening of contracts above EUR 150,000 but below the EU threshold for tenders by means of the anti-mafia communication. Contracts above the EU threshold must be screened by means of anti-mafia information, which involves a more detailed check.

In the Netherlands, natural and legal persons applying for subsidies, tenders and licences as well as contracting for real property transactions can be screened under the BIBOB Act. This focus on specific administrative decisions makes the Act narrower than the Italian Anti-mafia Code. Moreover, the BIBOB Act is limited to certain economic sectors, such as the bar and restaurant sector, the transport sector and the *coffeeshop* sector, which is again more limited than the Italian system. A person may be excluded from an administrative decision if there is a serious risk that the decision will serve (in part) to allow him/it (a) to make use of proceeds obtained or yet to be obtained from criminal offences that have been committed or (b) to commit criminal offences. Criminal offences also include administrative infringements.

Both screening instruments apply in the case of a relationship with the local administrative authorities. As we have seen, the Dutch screening instrument is more limited in terms of both the types of administrative decision and the economic sectors for which screening can be conducted. The Italian instrument on the other hand is narrower when it comes to the reasons for exclusion (offences involving mafia-type associations) and the financial threshold (exclusion of low-value contracts). In Milan, however, low-value contracts are now being screened in connection with the coming EXPO 2015. The screening procedure has revealed many irregularities and the involvement of criminals in low-value contracts, rousing suspicion of criminal contra-strategies.<sup>49</sup>

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47 This would lead to unnecessary double explanations of the overarching instruments.

48 Interviews in Milan and Rome in the week of 22 September 2014.

49 Interview at the Prefecture of Milan, 25 September 2014.

The procedures for the two instruments differ greatly. The Italian local administrators must ask the authority at the provincial level, the prefect, to screen the legal or natural person by means of the anti-mafia documentation instrument. This includes a check in the national anti-mafia database and, in the case of the anti-mafia information instrument, the possibility of performing on-site checks. If impediments are found, the prefect will send a prohibitive communication to the local authorities. The prefect's opinion is binding. Italian local authorities thus have no access to the relevant information on the legal or natural person. Dutch local authorities are initially allowed to screen the person themselves, based on the information they can access.<sup>50</sup> If, after detailed screening, the local authority is in doubt as to the risk that a person poses, the *Landelijk Bureau BIBOB* (Bureau BIBOB) can be asked to advise. Bureau BIBOB is allowed to request even more information from several authorities<sup>51</sup> and, after careful consideration, issues its advice to the original administrative authority. This advice is not binding, but in practice it is often followed. Compared to the Italian system, where the prefect conducts the screening, screening by Bureau BIBOB is more limited, in the following ways. First, Bureau BIBOB can request information from closed sources, but the owners of the databases determine whether to provide the information (in full). Moreover, the public prosecutor can request that some information regarding criminal investigations is not included in Bureau BIBOB's recommendation if there are significant interests involved in connection with criminal prosecutions. Other information suppliers can also request for the omission of certain information. In Italy, on the other hand, the prefect is allowed direct access to the information in the national anti-mafia database. Second, Bureau BIBOB cannot actively gather information. The Italian system goes a step further and allows on-site checks under certain circumstances. According to the prefects, these on-site checks are invaluable in ascertaining the presence of mafia infiltration.<sup>52</sup>

Both instruments allow for far-reaching screening with regard to the subjects. In Italy, not only is the person applying for the administrative decision screened, but (in the case of the anti-mafia information instrument) also his family members. In the Netherlands, BIBOB screening can be extended to the following persons. First, persons can be seen as posing a serious risk if they have been involved in criminal offences, either because they have committed the offence themselves or because they are or were in charge of, control or controlled, or provide or provided capital to a legal person that has committed criminal offences within the meaning of Article 51 of the Dutch Criminal Code.<sup>53</sup> Moreover, it can also be extended to *another person* who has committed these criminal offences or is or was directly or indirectly in charge of, controls or controlled, or provides or provided capital

50 This includes several open and semi-closed sources as well as information provided by the applicant.

51 Including several closed sources, such as on-going police investigations.

52 Interviews in Rome and Milan in the week of 22 September 2014.

53 This concerns the criminal liability of legal persons.

to the person concerned or is or was in a joint business venture with him. The ‘joint business venture’ was included to prevent deceptive constructions to circumvent screening, such as ‘straw men’.<sup>54</sup> Dutch screening under the BIBOB Act therefore includes a much broader circle of persons, as well as past relations, than the Italian screening procedure.

Last, the Netherlands has a specific provision allowing the public prosecutor to inform the administrative authority that it may ask Bureau BIBOB to advise on a legal or natural person. This is because information flowing from the police and judicial authorities to the administrative authorities is pivotal in properly implementing an administrative approach to crime. The prosecutor should only use this provision if he is then willing to share the information he possesses on the person in question with Bureau BIBOB. There is currently no such provision under Italian law.

Below we discuss the screening instruments in the scope of licences, subsidies and public procurement. Where necessary and appropriate, reference will be made to the foregoing comparison between the Anti-mafia Code and the BIBOB Act.

#### 12.4.1.2 Screening instruments in the scope of licences

Administrative authorities are enabled by law to assess the conduct of an applicant before making an administrative decision. Such an administrative decision may involve granting, refusing or revoking a licence. For the purposes of this section, we also include permits and concessions for economic activities.

As mentioned above, licences can be screened under sector-specific laws, or based on overarching laws generally governing screening in the context of government decisions. Two of these overarching laws may be applicable to licences, namely the Italian Anti-mafia Code and the Dutch BIBOB Act.

Assessments of conduct can be found in the sector-specific laws regulating administrative matters. In the Czech Republic, applicants must be of ‘unimpeachable character’ to be granted a licence. In Sweden, an assessment of conduct and suitability is required in the context of several regulated industries. Such assessments are also conducted in Poland, Belgium, England and Wales, Germany, the Netherlands and Italy and focus on the character, reliability or suitability of an applicant for a particular economic activity.

The exception to this rule is Spain. Most business activities do not require a licence that includes a conduct assessment, except in very specific cases.<sup>55</sup> In contrast, certain professions are screened, and that includes an assessment of the applicant’s conduct in a *Certificado de Antecedentes Penales* (see Section 12.4.1.1.1). In most other cases, the

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54 A ‘straw man’ is someone who has no criminal record and is put forward to lead or manage a company while in reality a person with a criminal history actually controls the company.

55 These encompass Lottery and Gambling licenses, licenses for taxi drivers, licenses for private school owners and licenses for private security company owners.

applicant's personal background is not screened; instead, if licences are required,<sup>56</sup> the screening involves the technical requirements of buildings and whether the business activity would cause nuisance in the direct environment.<sup>57</sup> Recent developments in Spain intended to stimulate the economy and curb bureaucracy, i.e. the *Licensia Express*, have changed the procedures for obtaining licences. Rather than applying for a licence before starting up a business, applicants notify the administrative authorities by submitting a declaration, which is screened later. This *ex post* screening only covers the aforementioned technical requirements, however. For these reasons, we will not discuss Spain any further in this section.

The subject of the screening can either be a natural person or a legal person in all selected Member States. There are no separate instruments for screening legal persons in the scope of licences. However, information that applies to a legal person, e.g. registration with the national Chamber of Commerce, cannot be vetted for natural persons. Moreover, all selected Member States screen the natural persons behind the legal person. For instance, in Italy, the anti-mafia documentation instrument can be used to subject all sorts of natural persons who represent companies to screening, e.g. company owners and technical managers, legal representatives of associations, all local company representatives as well as the legal representatives of foreign companies.

Although most Member States screen only the person applying for the licence, some screen persons other than the applicant as well. First of all, in Belgium a hard liquor licence requires screening not only of the applicant but also any persons living with the applicant and any persons living in the building in which the licence will be exploited, if they are involved in that exploitation. Second, as we mentioned earlier, the anti-mafia information instrument in Italy also allows for the applicant's family members to be screened. In the Netherlands, screening in scope of licences goes furthest under the BIBOB Act.

The manner in which an assessment of conduct is initiated differs per Member State. In general, such assessments can be divided into a) conduct assessments initiated by the notification of a legal or natural person wanting to be registered in a relevant trade register and b) conduct assessments initiated when a natural or legal person wanting to pursue business activities applies for a licence, concession or a permit.

#### *a. Conduct assessment initiated by notification*

A conduct assessment that is initiated when a competent administrative authority receives notification is the most straightforward way to supervise a certain economic sector. In general, the notifying person furnishes certain information to the competent authority to

56 Licences are not required for 'regular activity'. The local authorities distinguish between licensable and regular activities.

57 Further clarified by the interviews in Madrid in the week of 15 September 2014.

allow him/it to start up a business. The authority performs an *ex post* check. Notification leads to registration in a general or sector-specific register. Persons can be refused registration under certain conditions, for instance a criminal record or a ban on performing that type of activity (see Section 12.4.1.5). Being admitted to the register allows the supervisory authorities to monitor and supervise the persons registered. The country reports on Poland, the Czech Republic, France, Germany and Sweden mention the duty to notify the competent authorities of general or specific business activities. The following examples can be given.

In Poland, all natural and legal persons that wish to start a business must be registered as entrepreneurs, regardless of sector-specific obligations to apply for licences or concessions. Two separate registers exist, one for natural persons and one for legal persons. There is no general requirement regarding the applicant's criminal antecedents, but natural persons are subject to a background check depending on the type of business activity. Natural persons acting as legal persons are screened for certain types of criminal offences if they are members of the management or supervisory board of a legal person. If someone is already a member of such a board and is convicted of such a crime, he is expelled from his position. Apart from this general obligation to register, Polish law distinguishes between activities requiring a concession, activities requiring a permit, or regulated activities. A regulated activity requires the entrepreneur to enrol in the relevant register. Currently, there are twenty different regulated activities in Poland, e.g. driving schools, biofuel production, alcohol production, currency exchange offices and operating a nursery or kindergarten. These activities have their own registers. To be admitted to a register, the applicant must produce a certificate from the National Criminal Register. Registration makes it possible for the competent authority to exercise monitoring and supervision.

Under French law an example of a notifying obligation consists out of the following. Anyone looking to open a pub, bar or public house, submits a written statement to the relevant administrative authority.<sup>58</sup> This statement includes the person's particulars, information on the establishment and a *permis d'exploitation*.<sup>59</sup> The competent authority provides the applicant with a receipt, which also contains a tax licence. Nonetheless, the authority will send the initial statement of the applicant to the public prosecutor and the prefect of the department. This can lead to criminal investigations.

In Germany, the Trade Regulation Act obliges a legal or natural person who starts a business at a fixed location to notify the competent administrative authority. The authority will proceed to register the person in the Trade Register. This register is managed by the municipal authorities. Certain economic sectors, such as the trade in second-hand goods and detective agencies, are subject to special inspections based on the Trade Regulation

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58 In most cases this is the mayor of the municipality, however in Paris the relevant authority is the prefect of the police.

59 This is a certificate obtained after completing a compulsory training on the rights and obligations of a restaurateur.



Act. In such cases, the reliability of the notifying person will be checked. This includes a review of the person's certificate of good conduct and an excerpt from the Central Trade Register. The excerpt can contain prohibitions against engaging in certain trades (see Section 12.4.1.5), as is the case in Poland. This information is provided either by the notifying person or by the authority *ex officio*. The notifying person is obliged to provide this information, as well as other information required by the authority.

Sweden also imposes the duty to notify the authorities of a business activity. Notification enables the relevant authority to monitor and supervise the business activity. Sectors for which this is applicable include money exchange activities, certain deposit-taking activities, the sale of used goods and the sale of certain alcohol and tobacco products. In some sectors, but not in all, the notifications are entered into the relevant sector register. If such a register exists, persons who have committed serious crimes or seriously breached business obligations are not allowed to engage in the relevant business activities.

*b. Conduct assessment initiated by the application for a licence, permit or concession*

One step beyond simply notifying the local government of a business activity is the obligation to ask the government for permission to conduct that activity, which it then issues in the form of a licence, permit, concession or other sort of permission.

In the relevant Member States, such permission is connected to sector-specific laws or local regulations. These dictate the conditions under which the economic activity may be undertaken, including the requirement of a licence, permit or concession. Moreover, legislation regulates which authority is competent to grant the licence and which information sources can be used to perform assessments of conduct in the scope of the licensing procedure.

The subject-specific and fragmented nature of administrative law is particularly obvious when it comes to licensing. The competent administrative authorities are appointed under the sector-specific laws, resulting in a wide range of supervisory and licensing authorities in each Member State for various matters. Whether these authorities are centrally, locally or regionally embedded depends on the specific legislation. This institutional framework will be discussed further in Section 12.6.

Based on the country reports, all the licensing authorities are generally allowed to check an applicant's criminal background in the context of conduct assessments, with the minor exception of conduct assessments under specific legislation in Sweden.<sup>60</sup> The sector-specific laws do not necessarily require a person to have no previous convictions whatsoever. For example, older convictions may be regarded as spent<sup>61</sup> (England and Wales, the Czech

<sup>60</sup> These are conduct assessments concerning environmentally hazardous activity, without a check into the applicant's criminal background.

<sup>61</sup> I.e. the convictions are out of date.

Republic), certain prior convictions can be excluded by the applicable sector-specific law (Belgium), or the authorities can use discretionary power – if applicable – to assess and if possible disregard these convictions (Sweden, the Netherlands). For instance, in Belgium applicants for a casino licence are screened for convictions that resulted in an incarceration of six months or more within a timeframe of three years prior to the application. Moreover, depending on the type of activity, only criminal conduct relating to that activity is taken into account in all the selected Member States. Again, in Belgium the same casino licence applicant cannot have been convicted of crimes relating to games of chance. The more risk an activity poses, the stricter the screening becomes. For example, concessions in the weapons industry in Poland are only awarded to those with a spotless record, i.e. persons who have not committed or have been suspected of committing intentional and fiscal crimes. The same is true for the Polish private security industry.

The question that remains is what we should understand by an assessment of conduct, and what kind of information contributes to this assessment. To begin with, the terms used for conduct assessments – such as ‘unimpeachable character’ (the Czech Republic), ‘assessment of conduct and suitability’ (Sweden), ‘good conduct’ (Poland), ‘absence of impediments’ (Italy) and other terms – imply more than just the absence of criminal activity. The assessments may also include a check into an applicant’s financial background (the Netherlands, Poland, Sweden), his professional background, for instance whether he has a degree or experience in a certain branch (Sweden, the Czech Republic, Poland, France), or other factors, e.g. whether someone is an alcoholic when applying for licence to run a bar or restaurant (Germany), whether certain patrimonial measures have been imposed (Italy) or whether he has violated administrative law, resulting in administrative offences (the Czech Republic, the Netherlands). Other exclusionary reasons may be violations of health, labour and food laws (Germany, Belgium). One specific example of a conduct assessment that applies in all the Member States is the following. The Third Money Laundering Directive<sup>62</sup> requires all EU Member States to register casinos, money service businesses and trust and company service providers. These types of businesses are registered after they have passed a ‘fit and proper test’, essentially introducing or maintaining a licensing scheme for these sectors. The test not only assesses the company or person’s criminal background but also their financial fitness. The country reports for England and Wales, France, Poland and Belgium report a licensing test of this kind.

The French situation is a good example of the closely monitored casino branch. Historically, gambling has been a strictly monitored activity in France, caused by the potential vulnerability of the sector to criminal activity. Casinos can only operate in municipalities<sup>63</sup>

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62 Directive 2005/60/EC.

63 Also, the municipalities able to conclude such an agreement is restricted to large municipalities or those with certain specific tourist features.

with which they have concluded an agreement. This agreement allows the municipalities to impose taxes and social obligations on the casinos, such as the investment in centres treating persons with gambling addictions. The temporary licence is granted by the Ministry of the Interior based on information of the applicant's agreement with the municipality, his capital and the (proposed) management. Pending the licence, the Ministry consults with the *Commission consultative des jeux de cercles et de casinos* [The consulting Commission on horseracing and casinos], who reviews advice from the municipal council, the prefect of the department and the *Services Central des Courses et Jeux* [The Central Service on Horseracing and Casinos]. The *Services* screens the applicant's background, financial integrity and the source of his capital. The Ministry is not obliged to follow the advice of the *Commission*, but has discretionary power in the matter. Once the licence is granted, the Ministry is the competent authority to monitor the casino and can repeal the licence if infringements occur.

Second, information that can be used to establish whether an application should be refused or a licence withdrawn consists mainly of the applicant's criminal history (Belgium, Germany,<sup>64</sup> England and Wales, the Netherlands, the Czech Republic, Poland, Sweden and Italy). A certificate of good conduct or excerpt from the relevant database in the specific Member State (the Czech Republic, Germany, Sweden and the Netherlands) can offer insight into a person's criminal history. Under certain circumstances, provided for in national legislation, the administrative authorities can also check the person's criminal history themselves (the Netherlands, Sweden, Poland) or can ask a higher authority to check the criminal records, as happens in Italy. When an Italian local authority, acting under the circumstances provided for by law, needs to assess whether there are impediments to granting a person a licence, they send a request for anti-mafia documentation to the prefect, including the applicant's registration with the Italian Chamber of Commerce. The prefect is an administrative authority at the provincial level. He will check the national anti-mafia database, after which he will send his *interdittiva*, i.e. the anti-mafia communication or information, to the local authority. The administrative authority is bound by the *interdittiva*.

The administrative authority can also request additional information directly from the applicant (the Netherlands, Germany). Some authorities are allowed to receive a copy of the conviction and the underlying case files (the Czech Republic) or can request information and opinions from other authorities on the applicant, including police opinions (Poland), police information (the Netherlands), open sources (Sweden, the Netherlands) and tax information (the Netherlands). Other authorities are allowed, under certain circumstances,

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64 The report however phrases this implicitly: 'The licence has to be denied if facts justify the assumption that the applicant will encourage alcohol abuse, illegal gambling, handling of stolen goods or immorality.'

to do on-site checks before granting the licence.<sup>65</sup> In Italy, the prefect, in the scope of the anti-mafia information instrument, can perform on-site checks to review whether the applicant – usually a legal person – has been infiltrated by the mafia.

After the information is received, the licence is either granted or refused, or, if it has already been granted, withdrawn or suspended. In most of the selected Member States, this decision is up to the administrative authority, with the exception of Italy and Poland. These two countries put differing limits on such discretionary powers. In Italy, the local authority asks the prefect at the provincial level to provide an anti-mafia communication or information on an applicant. Whether the communication (less invasive) or information (more invasive) is required depends on the value of the project for which a licence is being sought. After performing the necessary checks in the relevant databases and (if necessary) on the ground, the prefect issues a prohibitive communication or information to the local authority if he finds impediments in the applicant's records. The local authority is obliged to follow this binding opinion. In Poland, the administrative authority is obliged to issue the permit in certain sectors if all the necessary conditions have been fulfilled. The necessary conditions are specified in sector-specific laws, for instance concerning waste collection and processing and the retail and wholesale distribution of alcohol.

### **The consequences of screening applicants or holders of licences**

The consequences of screening can be either reactive or preventive in all the Member States. If the administrative authority refuses a licence based on previous criminal convictions, the refusal is motivated by the idea that the licence will not be used properly. To prevent improper utilization, the administrative authority takes preventive action by refusing permission to perform the economic activity.

Moreover, in all the Member States, supervision and monitoring can lead to the revocation, suspension or withdrawal of a licence if screening confirms that criminal activity is taking place or that the licence holder is not adhering to the licensing conditions. Such action is reactive, since the administrative authority reacts to infringements of the law. Whether revocation, suspension or withdrawal is seen as an administrative sanction depends on national law. This will be discussed in Section 12.4.2.

An administrative decision involving the refusal or revocation of a licence, concession or permit needs to be properly motivated and the person involved can turn to certain remedies against the administrative decision. Section 12.5 of this chapter will compare the systems of due process in the selected Member States.

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65 Which differs from other inspection powers; this will be discussed in Section 12.4.2.

### 12.4.1.3 Screening instruments in the scope of subsidies

On the topic of screening in relation to subsidies, we can be relatively brief. Public aid (and competition) is a heavily regulated and complex area in European law.<sup>66</sup> It is sufficient to mention here that state aid under the relevant EU provisions consists of government support, except for support granted to individuals or general measures open to all enterprises.<sup>67</sup> The EU provisions prohibit state aid for the most part, unless justified for reasons of general economic development.<sup>68</sup> It is beyond the scope of this study to discuss this complex area of the law at length. This section will focus on subsidy-related screening with a view to the risk an applicant with a criminal background may pose.

Not all of the country reports discuss screening in relation to subsidies or public aid. We focus here on the country reports that do (the Netherlands, Italy, Poland, Spain, the Czech Republic and Sweden).

What do the selected Member States understand by a subsidy? We did not define the term beforehand to ensure that our respective authors would not feel constrained in their discussion of their legal systems. As a result, they report on a diverse range of legislation relating to subsidies.

Several reports start by defining what a subsidy is, either explicitly or implicitly. Under Dutch law, subsidies are: ‘a claim to financial means, provided by an administrative authority for certain activities of the applicant, other than payment for goods and services.’ Commercial activities involving public and private institutions therefore fall outside this framework.<sup>69</sup> Social security benefits, such as student aid and social housing allowances, also fall outside the scope of this definition. In the Czech Republic, the definition of a subsidy is based on EU legislation, namely Article 107 TFEU: ‘any aid granted by a state or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.’ This is also true for Poland; its country report discusses subsidies in the context of state aid, with reference to the relevant European legislation. In Sweden, subsidies include EU grants as well as social security benefits. Spanish subsidies entail the granting of money by certain administrative authorities for the benefit of public or private persons. Excluded from this definition are inter-administrative contributions, contributions from central to local governments, and a range of social benefits. Thus, in some of the selected Member States social security benefits are not considered subsidies (the Netherlands, Spain) whereas in others such benefits represent a major share of subsidies (Sweden). Other countries simply leave us in the dark about the position of benefits (Italy, Poland and the Czech Republic).

66 See for instance: Schoenmaekers, Devroe & Philipsen 2014.

67 [http://ec.europa.eu/competition/state\\_aid/overview/index\\_en.html](http://ec.europa.eu/competition/state_aid/overview/index_en.html).

68 [http://ec.europa.eu/competition/state\\_aid/overview/index\\_en.html](http://ec.europa.eu/competition/state_aid/overview/index_en.html).

69 However, see Section 12.4.1.4 on public procurement.

With regard to the screening of applicants, two groups can be discerned. Italy and the Netherlands apply overarching legislation concerning the screening of applicants for subsidies, i.e. the Anti-mafia Code and the BIBOB Act (see Section 12.4.1.1.2). The screening procedures for subsidies are (almost)<sup>70</sup> the same as for the other administrative decisions for which these instruments apply. Other countries have specific legislation on subsidies, including the screening of applicants (Sweden, Spain, Poland, the Czech Republic). However, the applicable procedures are usually only meant to ensure that the applicant fulfils the conditions set by EU legislation (the Czech Republic, Poland, Spain). Nevertheless, the applicant's criminal history can be screened indirectly because the subsidy will allow him to become active in a certain economic field, and screening will then take place as part of the licensing procedure for that field (the Czech Republic).

Finally, Sweden is a special case. The Swedish welfare state is unique in the world, offering all sorts of government benefits in support of various activities. According to the country report, these benefits are all considered subsidies.<sup>71</sup> To combat social benefit fraud, Sweden has introduced a number of administrative measures, such as inspections, exclusion from benefits, denial of benefits, and the reclaiming of benefits. The government, mainly the Social Security Agency, has taken action in cooperation with other authorities, for example the police, the tax authorities and the public prosecutions office. Such cooperation focuses on information-sharing between the authorities to uncover the fraudulent use of the welfare system.

Following on from this, we can say that the matter of subsidies, their scope and the relevant screening procedures vary greatly between Member States. In general, the screening procedures mainly involve checking compliance with EU rules. Screening therefore focuses less on the person of the applicant than it does for licences (with the exception of Italy and the Netherlands, which have overarching legislation, and Sweden, with its focus on social security benefit fraud).

#### **12.4.1.4 Screening in the scope of public procurement**

This section compares the selected countries in terms of screening and monitoring natural and legal persons in public procurement procedures. Since EU directives<sup>72</sup> apply to tenders for works, deliveries and services above a certain threshold sum, we will assess their implementation in the different countries and provide a brief overview of EU legislation in the process. Our comparison also considers whether national legislation goes above and

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70 Concerning the BIBOB Act, there are two exceptions. First, subsidy-related screening basically applies in all economic sectors. This differs from screening for licences, which only applies in a few economic sectors. Second, the subsidy must include BIBOB screening as one of its conditions. The Dutch legislator assumes that this condition will apply for all public subsidies in line with legislation or government decrees.

71 Although they would not fall under the EU definition of state aid.

72 Directive 2004/18/EC and Directive 2004/17/EC; De Moor-van Vught 2012 p. 65-76.

beyond the EU legislation. We also compare the Member States' quality assessments of natural and legal persons tendering below the EU threshold (where applicable).

### **Quality assessment of legal and natural persons under Directive 2004/18/EC<sup>73</sup>**

In assessing tenders, we must distinguish between a qualitative assessment of the tenderer, the selection of providers, and the allotment criteria.<sup>74</sup> For the purposes of this study, the qualitative assessment of the tenderer is of primary importance.

Article 45 of *Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts* sets out compulsory exclusion grounds (paragraph 1) and facultative exclusion grounds (paragraph 2) for this quality assessment.<sup>75</sup>

The compulsory reasons for exclusion by the tendering authority include previous convictions for participation in a criminal organization, corruption, fraud and money laundering. The facultative exclusion grounds comprise bankruptcy or similar situations, offences concerning professional conduct, failure to fulfil obligations to pay social security and other taxes, or the misrepresentation or failure to provide information as required under Section 2 of the Directive, according to Article 45 paragraph 2g of the Directive. Whenever an authority looks to tender and assess whether an applicant should be excluded and for which period, it needs to take into account the proportionality principle and the principle of non-discrimination.<sup>76</sup> As a rule, all public authorities must take the compulsory and facultative exclusion grounds into account before each tendering.<sup>77</sup>

Additionally, threshold sums apply. These differ per tender topic (works, supply or service) and can be found on the European Union website.<sup>78</sup>

In general, all the selected Member States have implemented the EU directives on tender procedures, including the compulsory and facultative exclusion grounds. Some reports mentioned this implicitly, but the facultative and compulsory exclusion criteria imposed under the Directive can be found in each countries' procurement procedure. The same is true for the derogation grounds. Moreover, all Member States request information on the economic and financial quality of the tenderer during the tendering procedure. Some countries also maintain certain lists of persons banned from contracting with the

73 This regime is applicable until 17 April 2016. The EU public procurement regime will be reformed under *Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC*. This new regime must be enforced by the Member States by 18 April 2016 and the old regime must be repealed. The new regime will bring about changes to the compulsory and facultative exclusion grounds, for instance adding terrorist and human trafficking offences to the compulsory exclusion grounds. Facultative grounds include bankruptcy or insolvency of the economic operator.

74 Van Daele et al. 2010, p. 137ff.

75 Van Daele et al. 2010, p. 137-140.

76 Van Daele et al. 2010, p. 140. See also 't Hart 2006, p. 616ff.

77 Van Daele et al. 2010, p. 140. See also 't Hart 2006, p. 616ff.

78 [http://ec.europa.eu/internal\\_market/publicprocurement/rules/current/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/rules/current/index_en.htm).

public sector. Such registers exist in Poland, the Czech Republic, the United Kingdom, Italy and Spain. In Poland and the Czech Republic, these lists are open sources and published online. The contracting authority is allowed to check the applicant against the list of banned persons.

The Member States differ in the way they conduct their procurement screening procedure. One important difference is whether the applicant supplies information about the exclusion criteria to the contracting authority, or whether the contracting authority can access the information itself.

In the Czech Republic, Poland, Sweden, England and Wales, France and the Netherlands, the primary burden of proof regarding the absence of exclusion criteria, i.e. the absence of convictions for certain crimes, lies with the applicant at the time of application. The Dutch Public Procurement Act 2012 requires a statement or declaration concerning the absence of exclusion criteria. The applicant must substantiate the statement by submitting relevant documents, such as an excerpt from the national criminal records registry. Moreover, the contracting authority is allowed to ask for additional information regarding the applicant's economic and financial fitness. The aforementioned Member States differ with regard to this additional information. In Sweden, Poland and the Czech Republic, the contracting authority is not allowed to access this information. For example, if it requires a declaration by the national tax authority concerning the applicant's tax debt, then the applicant must submit this information; the contracting authority may not petition the tax authority for this information. On the other hand, in the Netherlands the contracting authorities are allowed to follow up information from the criminal registers, i.e. the certificate of good conduct, and search in open and closed or semi-closed information sources themselves, as well as ask Bureau BIBOB for advice.

*An example of screening in relation to public procurement is the (now concluded) Nacka project in Sweden, which was operational in 2009 and 2010. Nacka is a fast-growing municipality in the Stockholm area. The municipality decided to focus on the building industry to ensure the quality of the contractors. This meant excluding persons convicted of being part of criminal organizations, bribery, fraud, etc. Screening of applicants (whether natural or legal persons) took place during the procurement qualification phase and when the contract was awarded. Information supplied to the municipality included information on the applicant's financial soundness, including checks with the Swedish Tax Authority for outstanding tax debt and other government debts, checks with the social security registers, etc. Problems could lead to exclusion. Once a contract had been granted, there were follow-up checks every four months. The contractor was obliged to supply the municipality and the Tax Authority with information on its financial soundness as well as the involvement of any subcontractors. Moreover, the municipality conducted on-site checks to ensure compliance.*



*This method has now been implemented for all service contracts concluded by the Municipality of Nacka.*<sup>79</sup>

The option of conducting on-site checks is comparable to the on-site checks performed by the Italian prefects under the Anti-mafia Code.

In conclusion, the contracting authorities in the aforementioned countries decide to grant a contract or refuse a tender based on information that they have accessed themselves or that has been given to them by the applicant. An exception to this rule is Italy. When an Italian procurement procedure commences, neither the contracting authority nor the applicant provides the necessary information on the latter's quality. Instead, the prefect, in line with the Anti-mafia Code, screens the applicant. The opinion issued by the prefect is binding.

### **Additional rules concerning tenders not (or not fully) subject to the EU directives**

Although the EU Public Procurement Directives do not cover tenders under the EU thresholds, the European Commission provides an interpretative communication on this particular topic in which it suggests best practices.<sup>80</sup> In the communication, a distinction is made between: cases for which the EU framework does not apply at all, i.e. low-value contracts (when there is a sufficient connection with the Internal Market)<sup>81</sup> and; cases for which the EU framework does not fully apply, i.e. contracts mentioned in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC that exceed the thresholds for application of these Directives.<sup>82</sup>

The interpretative communication summarizes the existing case law of the ECJ in stating that for the above types of contracts, the rules of the Internal Market still apply and the contracting authorities are bound by the fundamental rules of the Treaty.<sup>83</sup> The basic standards as developed by the ECJ include an obligation of transparency. This implies the obligation to sufficiently advertise the tender as well as an impartial application procedure and the possibility for review of these procedures.<sup>84</sup>

The country reports on public tendering in the scope of this study show no contradiction of the above. Some country reports mention specific rules pertaining to tenders below the

<sup>79</sup> Interview, Municipality of Nacka, 5 March 2014.

<sup>80</sup> Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, *Official Journal* 2006/179/2, p. 2-7. Hereafter: 'Commission interpretative communication'.

<sup>81</sup> This 'sufficient connection' is not established in individual cases when a very modest economic interest is at stake and the contract is of no interest to economic operators in other Member States. Commission interpretative communication, p. 3; *Coname* case, paragraph 20.

<sup>82</sup> In practice, these contracts exceed the threshold of € 193,000 and involve legal or health services.

<sup>83</sup> Commission interpretative communication, p. 3; *Bent Mousten Vestergaard* case, paragraph 20.

<sup>84</sup> Commission interpretative communication, p. 3-7.

EU threshold, such as in the Netherlands and the Czech Republic. These rules are usually applied at the local level. Moreover, in Italy the Anti-mafia Code also applies to tenders and contracts below the EU threshold. However, the Anti-mafia Code also has a financial threshold. Contracts falling below that threshold (€150,000) are not generally screened. In Milan, however, the upcoming EXPO 2015 gave the authorities the opportunity to screen contracts below the Anti-mafia Code threshold, leading to the discovery of many irregularities and criminal involvement in contracting parties.

#### **12.4.1.5 Prohibitions to trade**

The final (and indirect) screening measure that we will discuss are the prohibitions against trade. Some Member States allow persons to be barred from performing certain economic activities. The foregoing sections mentioned such lists as part of the screening procedures. Prohibitions against trade are not screening instruments themselves, but screening a person for such prohibitions can be a decisive factor in their pursuit of an administrative decision. We discuss these measures briefly here.

Trading bans, i.e. prohibitions against or exclusions from trading, can be found in Germany, Sweden, Poland, Italy, Spain, France and the Czech Republic. In general, the measure can be applied to all sorts of business activity. For instance, in Italy, it can be imposed as a preventive measure, with the relevant person subsequently being screened as part of the anti-mafia documentation instrument. In Poland, it is specifically intended for economic activities that do not require a permit, authorization or licence of any kind, i.e. the 'regulated activities'. The same is true for Germany. After all, infringement of licensing, permit or authorization conditions can result in revocation, withdrawal or suspension, making prohibition unnecessary. In France, two separate types of prohibition to trade exist, namely the additional measure imposed by a criminal court on a convicted person and the personal disqualification prohibiting natural persons from engaging in business activities or management.

In most Member States, it is an administrative authority that prohibits the person from engaging in economic activities (Germany, Poland, the Czech Republic). In Italy, the exclusion from trading is a preventive measure applied by a court. In Sweden, however, this ban on trading is an additional measure requested by the public prosecutor when prosecuting for criminal offences as a 'special legal consequence'. The measure itself therefore cannot be qualified as penal or administrative.

A prohibition against trading may be imposed owing to the unreliability of the person, which may include criminal convictions (Germany), as a special legal consequence after criminal conviction (Sweden), or due to false statements or a breach of the trading condi-

tions (Poland). Specific to Sweden is the fact that known straw men<sup>85</sup> can also be subject to a trading prohibition.

The main consequence of the prohibition against trade is that it is documented in a central register (Germany, Sweden, Italy, Czech Republic). The administrative authorities can be informed about entries in such registers by requiring certificates of good conduct (Germany, the Czech Republic, Italy). Yet, in Poland the measure imposed by the competent registry authority leads to a (automatic) removal of an entrepreneur from the applicable registry.

Trading bans and registers can be useful in an administrative approach to crime with cross-border dimensions. The registers can provide useful information for administrative authorities in other Member States, without the need to access penal information. Caution is advised, however, because the registers only provide some information, namely the economic activity from which a person has been banned, and not the complete picture that includes their criminal history. Moreover, not all of the selected Member States have such registers, limiting the potential for a coherent approach.

#### 12.4.2 *Public order powers*

Local administrative authorities bear primary responsibility for keeping public order in their territory. They can be empowered to do so by higher (i.e. national) legislation, but they can also regulate certain key aspects in their territory by issuing by-laws, decrees or other local regulations. Local regulations can also impose sanctions for administrative infringements and bestow powers of inspection. Apart from local authorities, other administrative authorities specifically assigned to regulate a certain sector, such as the health and food sector, the environment, etc., can use public order competences based on specific legislation. These competences can also be used to prevent criminals from misusing the legal infrastructure.

One important notion is that public order competences are intended to maintain public order in a certain territory or to regulate a certain sector. In most of the selected Member States they are not part of a policy to combat serious and organized crime, with the exception of the Netherlands. This does not imply that these measures cannot help prevent crime and the misuse of legal infrastructures. Readers should bear this in mind while reading the following sections.

For the purposes of this comparison, the powers to maintain public order can be divided into (1) powers of inspection, and (2) the power to intervene when public order is disturbed. The latter category can be divided into several subcategories. We discuss these below.

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85 In the Swedish country report, the term used is 'goal keepers'.

#### **12.4.2.1 Powers of inspection**

All the selected Member States have bestowed powers of inspection on local administrative authorities,<sup>86</sup> following on from national, local or sector-specific regulations. Most of the country reports only discussed these powers incidentally. Our comparison is therefore necessarily brief.

In all of the Member States, the focus is mainly on the powers of either local authorities or inspectorates or agencies established especially to deal with specific issues. These inspectorates or agencies can only exercise their powers of inspection and monitoring in the sector in which they have competence. When a licence has been issued, the licensing authority is the same authority empowered to check that the licensee is adhering to the licence conditions. The administrative authorities have been assigned several powers that can be exercised during checks or inspections. As discussed in the country reports, these include the power to enter premises, the power to request information, and the power to inspect documents.

As will become clear in Part III of this report, which considers the practical application of the administrative approach, the administrative authorities can wield their power to inspect within a multi-agency cooperation. This happened for instance in Poland during an ad hoc cooperation of several authorities relating to the ‘Cocomo clubs’. These strip clubs were suspected of committing fraud and constituted a public nuisance. Several administrative authorities, including the sanitary inspectorate, the labour inspectorate, the Polish tax authority and the building inspectorate, began to conduct inspections together with the local authorities. In some cases, the inspections led to revocation of the licence to sell alcohol, resulting in the subsequent closure of the club.

#### **12.4.2.2 Intervention by administrative authorities**

Administrative authorities may intervene when local, regional or national legislation is infringed. Such interventions may or may not be punitive, depending on national law. Since administrative law is subject-specific in nature, as we mentioned earlier, the country reports usually discussed the administrative authorities’ intervention when confronted with a certain crime phenomenon, instead of discussing all possible interventions. The crimes included illegal prostitution, drugs and illegal gambling. Interventions can generally be divided into the following categories: (1) repeal of an administrative decision, (2) intervention in or around premises and (3) administrative fines. These three categories of interventions are reactive in nature, as they respond to an established infringement.

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86 Even if not specifically discussed in the country reports, the presence of such powers became clear during the interviews in the relevant Member States.

#### 12.4.2.2.1 *Repeal of an administrative decision*

Based on a known infringement, the administrative authorities can decide to repeal an administrative decision. This means that the permit, licence or authorized activity covered by the administrative decision cannot be continued.

Several country reports explicitly mention the possibility of repealing an administrative decision (Germany, the Czech Republic, Italy, Spain, Belgium, France, Poland, Sweden and the Netherlands). A distinction can be made between the suspension of an administrative decision and the revocation or withdrawal of a decision. Suspension involves placing a full or partial temporary ban on the activity (Belgium, Italy, the Czech Republic); after the period of the ban has ended, the activity may be resumed subject to the initial administrative decision. Some reports mention that suspension can be followed by the revocation of the decision (Italy and the Czech Republic) or that revocation may follow a warning by the supervisory authority (Sweden). In Germany, repeals are divided into two categories: the withdrawal of an unlawful administrative act and the revocation of a lawful administrative act. A decision may be withdrawn if it is based on fraudulent information, for example. This is comparable with the situation of revocation and withdrawal under French administrative law.

Another difference is how the repeal of an administrative decision is qualified under the law. The decision to repeal an administrative decision can be qualified as an administrative sanction (Germany, and in some instances the Netherlands,<sup>87</sup> France<sup>88</sup> and Belgium<sup>89</sup>), but it can also be expressly qualified as not being an administrative sanction, i.e. concerning a suspension in Belgium.<sup>90</sup> Evidently, the qualification of a repeal as administrative sanction or not is important for the question whether the full rights arranged under article 6 ECHR are applicable.

Reasons to repeal an administrative decision vary, but the overriding reason is that it poses a risk or potential risk to the public interest and/or safety (Belgium, Spain, Poland, Germany, France and Italy). For instance, in Italy if premises are identified as a customary hangout for criminals or if public disorder and riots erupt, a licence may first be suspended. If the situation does not improve, the licence can be revoked by the *Quaestor*.<sup>91</sup> This measure is commonly used in Italy.<sup>92</sup> The example illustrates the reasons for repeal and the notion that different forms of repeal can succeed one another, in this case suspension and revocation.

87 Concerning a revocation based on spatial planning.

88 Depending on the intention of the administrative authority granting the decision or administrative authorisation.

89 See also: Van Daele et al. 2010, p. 206-209 and 445.

90 The other country reports provided insufficient information on the legal qualification of repeal of administrative decisions.

91 Provincial head of the state police.

92 Interview at the Prefettura Rome, 23 September 2014.

Another important reason to repeal an administrative decision is the infringement or violation of the conditions under which the decision was issued (the Czech Republic, Spain, Poland, the Netherlands, France and Germany). A change in spatial planning can also lead to the repeal of an administrative decision (Spain and the Netherlands), either when the designated purpose of a certain area or premises changes – which may then include financial compensation for the person affected (Spain) – or when the designated zoning of an area or premises has been violated (the Netherlands). Moreover, administrative decisions can be repealed if the liquidity of the entrepreneur has been affected (Poland) or if the decision was issued erroneously (Spain, Germany). The Polish report also mentions that the reasons for revoking administrative decisions are subject to legislative provisions governing that specific administrative decision. Since there are vast numbers of such laws, we will not discuss this here.

The foregoing comparison shows that the administrative authorities have numerous ways to intervene and maintain public order when they have granted permission, e.g. a licence, for certain activities. In the following section, we will focus on the possibilities of administrative authorities to intervene in or around premises.

#### *12.4.2.2.2 Intervention in or around premises*

Possibilities to intervene by administrative authorities in or around premises include suspension of economic activities, eviction of tenants, building maintenance (by either the administrative authority or the person responsible for the premises), closure of premises, barring someone from premises, expropriation of premises and the forced demolition of premises. The various options and the extent to which they can be applied differ per Member State. Here, we discuss private law actions, suspension, closure, and expropriation.

First, the reports on Sweden and England and Wales specifically mentioned the possibility of landlords or housing companies undertaking private law actions. For instance, in England and Wales, the landlord can ask a court for a possession order or injunctions against tenants.

Second, the authorities may suspend business activities and thus effectively close down the premises in which the activities occur. The suspension may involve allowing the person to rectify the situation so that it conforms to local regulations or the administrative decision on which the activity was based. In the Czech Republic, business activity can be suspended if the Trade Licensing Act has been violated. If the situation improves, the activity being carried out in the premises may continue. If not, suspension of licenses can take place, as discussed in the foregoing section. In Poland, the local authorities can also suspend economic activity for a brief period. The authorities must inform the relevant inspectorate during that period, which decides whether further action is required. Further action may also mean the prolonged suspension of the activity. For example, if the production of a prescription drug poses a risk to health, the State Sanitary Inspectorate can suspend its

production for up to three months as well as seize the products. In France, persons receive prior notice before the decision of the prefect to close a pub or restaurant, in order to enable the proprietor to prevent closure by making adjustments. Also, these establishments can be temporarily closed based on the public order powers of the mayor or prefect of the department for the maintenance of public order. The closure by the mayor is limited to the period necessary to restore public order, or in case of closure by the prefect for a maximum of two or three months, depending on the nature of the establishment.<sup>93</sup> In Germany, the police are able to close premises based on the *Sicherstellung* for as long as required to neutralize the danger that the premises pose, in effect taking the form of a suspension.

Third, it is possible to close down premises or bar persons from premises in the Czech Republic, Belgium, Germany, Sweden, England and Wales and the Netherlands. Such measures can be taken for several reasons relating to public order, health and safety. In Italy, the authorities are not specifically empowered to close premises, but they can revoke police authorizations, which amounts to the same thing in practice. In Sweden and the Czech Republic, the police can vacate or restrict access to buildings for public health and safety reasons. A similar provision exists in Germany, based on the aforementioned *Sicherstellung* as well as other national regulations that require licences for performing certain activities in premises, e.g. a bar or a restaurant. If an operator carries out that activity without administrative authorization, the premises can be shut down. In France, several types of closure of premises are available for the administrative authorities. First, violation of licencing conditions of bars and pubs can lead to repeal of licences by the prefect of the department,<sup>94</sup> effectively closing the premises. Moreover, bars and pubs can be ordered to close by the French Minister of the Interior after conviction for a criminal offence of the proprietor. This latter possibility is not qualified as a sanction, but as a measure to maintain public order. Violation of the order to close is punished with a fine. Also, both the mayor and prefect can temporarily close pubs, restaurants or bars as an administrative police measure when a violation of public order, health, tranquillity of morality occurs. Lastly, premises can be (wholly or partially) closed in the scope of criminal investigations concerning prostitution charges. After conviction, the French Criminal Code allows for the additional penalty of mandatory closure, even if the person concerned is not prosecuted himself. In this latter case, when it involves a bar, the licence can also be withdrawn. In Poland, premises can be closed when the holder of an administrative decision infringes the conditions of that decision. In England and Wales, police can issue temporary closure notices based on the ASBO Act 2003 if anti-social behaviour has taken place in the premises. In

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93 Three months in case of a discotheque, two months in case of a bar or restaurant.

94 Or in Paris the prefect of the police.

the Czech Republic, the administrative authority is also allowed to demolish the building or repair it in such a way that it does not form a threat to public safety.

In the Netherlands and Belgium, the mayor of a municipality may close down premises if public order is disturbed, based on local decrees and national regulations, i.e. the respective Dutch and Belgian *Gemeentewet*. Also in Belgium, there are specific regulations governing the closure of premises to combat human trafficking. This is in fact one of the competences of the mayor as the head of the municipal police. The Belgian provisions allow for closure for an indefinite period, as an administrative sanction, unlike in the Netherlands, where premises may only be closed temporarily.<sup>95</sup>

Both the Netherlands and Belgium have specific regulations allowing the closure of premises in connection with drugs. The Dutch *Opiumwet* and the Belgium *Drugswet* both allow for such measures if there are serious indications that drugs are being sold, distributed or delivered (the Netherlands) or sold, delivered or facilitated (Belgium) on the premises. In the Netherlands, the local municipal decrees further specify the manner in which the provisions for that territory are to be implemented. The Dutch mayor of a municipality is allowed to close the premises for a certain amount of time, even if the activity itself did not cause a public nuisance. Moreover, the mayor's competence is not limited to public premises; purely private premises can also be closed down. In Belgium, closure under the *Drugswet* is limited to public premises and private premises accessible to the general public. Closure is only permitted if there are serious infringements of the applicable law and serious disruptions of public order and safety. In summary, the Dutch intervention goes much further because the authorities may intervene without nuisance occurring and because private homes fall under the scope of the legislation.

Finally, expropriation of premises is a serious measure that can only be imposed under specific circumstances in the selected Member States. Only a few of the country reports specifically discuss this measure (the Czech Republic, Spain and the Netherlands). In some Member States, expropriation is seen as a sensitive issue owing to the communist past (the Czech Republic). In Spain, the measure can only be applied when dictated by serious public interests. The Spanish provisions require the affected person to be compensated. Using such a measure to tackle crime would be taking the relevant provisions in Spanish law too far. It is only in the Netherlands that premises can be expropriated either because they are a source of general disturbances of public order, to follow up on their closure in connection with drug dealing, or for health and safety reasons. However, the measure may only be applied in exceptional circumstances.

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95 Van Daele et al. 2010, p. 447.



#### 12.4.2.2.3 Administrative fines

Administrative authorities can punish infringements of public order by imposing administrative fines. Section 12.4.2.2.1 reviews when the repeal or closure of premises qualifies as a sanction.

All the selected Member States allow administrative fines to be imposed in the event of infringements of administrative regulations or decisions. The relevant measures were mentioned incidentally throughout the country reports. Examples of administrative fines are the notable German *Ordnungswidrigkeitengesetz* (Administrative Offences Act), which sets out general regulations for all administrative offences. The *Ordnungswidrigkeitengesetz* defines the administrative offence and restricts the sanction to an administrative fine. The Netherlands has the *Algemene wet bestuursrecht*, which makes it possible to penalize persons who do not comply with administrative regulations. There are three types of sanctions, one of which is specifically intended as a fine to be imposed on the violator (*bestuurlijke boete*).<sup>96</sup> This fine is punitive in nature.<sup>97</sup> In Belgium, the municipalities can apply fines in the form of the *gemeentelijke administratieve sancties* (GAS) if this option is included in their local decrees. These fines are also punitive.<sup>98</sup> Last, in the Czech Republic, specific administrative offences against public order were created both in the Misdemeanour Act and local General Binding Decrees. Administrative authorities are allowed to penalize such misdemeanours, as long as they are not labelled a criminal offence. The sanctions are not restricted to fines alone, but can also include warnings, the prohibition against undertaking a certain activity and the forfeiture of items.

In most of the selected Member States, administrative fines are not included in a person's criminal history. This is for example the case in the Czech Republic, where convictions for administrative offences do not mean that an applicant for a licence is not of 'unimpeachable character', as discussed in Section 12.4.1.2. In Belgium, GAS are not included in a person's criminal history<sup>99</sup> and these convictions will consequently not be included in the screening procedures for administrative decisions. However, in the Netherlands, *bestuurlijke boetes* do form part of the BIBOB screening procedure, as 'a criminal offence is deemed to include an infringement for which an administrative fine may be imposed'.<sup>100</sup>

In conclusion, the administrative authorities have several ways to intervene when public order is disturbed. As we saw, they can repeal an administrative decision but they

96 The other two sanctions can either impose administrative coercion or an administrative financial penalty. These are restoration sanctions, whereas the fine is a punitive sanction. There are specific regulations concerning the combined imposition of these sanctions Van Daele et al. 2010, p. 447.

97 Van Daele et al. 2010, p. 447.

98 Administrative sanctions in Belgium are always punitive. See: Van Daele et al. 2010, p. 202-205 and 447-448.

99 Van Daele et al. 2010, p. 202.

100 Article 3 paragraph 8 of the BIBOB Act. Official translation, Ministry of Security and Justice.

can act even when no prior decision has been taken. In such cases, they may maintain public order in and around premises and/or impose administrative fines.

#### 12.4.3 *Forfeiting assets outside the scope of criminal law*

The authors of the country reports were asked to elaborate on the seizure, confiscation or forfeiture of assets gained through criminal activity outside the scope of criminal law. In drafting the format of the various country reports, we deliberately did not limit this category to administrative measures alone, as previous research had indicated that measures to seize criminal assets also exist in other areas of the law.<sup>101</sup> In comparing the different reports, we can make several observations.

First, some country reports do not discuss instruments aimed at seizing criminal assets in any way. This includes Belgium,<sup>102</sup> France and Poland. It is unclear whether this is because their legal systems only provide for such instruments within the scope of criminal law, explaining the absence of a discussion in the context of this study, or whether such instruments do not exist at all. Nevertheless, the other reports do discuss measures directed at seizing assets gained through criminal activity. We can differentiate between Member States that regulate such measures mainly through criminal law (the Netherlands, Spain) and Member States that qualify such measures both under criminal law and civil and/or administrative law (Sweden, England and Wales, the Czech Republic and Italy, Germany).

In the Netherlands and Spain, the seizure of criminal assets is regulated solely under criminal law. The two countries view these measures differently, however. In the Netherlands, the fight against organized crime includes the targeting of criminal assets.<sup>103</sup> In Spain, on the other hand, the seizure of criminal assets is viewed as secondary to prosecution. Nevertheless, a debate is under way (in academia) regarding the seizure of criminal assets as an integral part of Spain's policy on serious and organized crime.

We have identified a number of measures outside the scope of criminal law aimed at seizing criminal assets in the other aforementioned Member States. These measures range from seizure under civil law to administrative seizure measures. The fact that these measures exist does not rule out any criminal law measures aimed at seizing criminal assets. In fact, the options discussed below should be viewed as complementary to the seizure of assets under criminal law. When necessary, we discuss the criminal law instruments.

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101 Also, as discussed in the country report, there is no clear distinction between civil law and public law in England and Wales. In the interests of drawing a concise comparison with the other Member States, however, we have applied this division whenever possible.

102 Although an interview with the local police in Liège revealed some options for seizing criminal assets in Belgium. However, the respondents explained that it is extremely difficult to enforce such measures in Belgium.

103 Ministry of Security and Justice, *Nederland Veiliger*, The Hague: January 2011, p. 4.

First, civil law measures can be used to seize illegally obtained assets. Sweden has the civil law measures of sequestration and lien. Sequestration can be applied by private persons and is aimed at securing the rights of a plaintiff, e.g. a financial claim, rights to property or other claims, in civil proceedings. The measure of lien is also intended to secure rights, but it can only be used by government agencies, e.g. the Swedish Tax Authority, to secure their rights. These measures are a common feature of civil law and are not intended merely to combat crime or criminals. They are also not included in Sweden's policy towards tackling organized crime. They can, however, be used in that manner, according to the authors of the Swedish report. In England and Wales, the legal system contains specific civil law measures specifically aimed at seizing criminal assets. Based on the Proceeds of Crime Act 2002, civil recovery is an instrument that can be used by the NCA and the Serious Fraud Office. The proceedings take place before the High Court and concern assets that are, or represent, property obtained through unlawful conduct. The proceedings are filed against the property (*in rem*) instead of against the person (*in personam*). The standard of proof is civil ('the balance of probability') rather than criminal ('beyond a reasonable doubt'), making it easier to apply the measure in practice. A criminal conviction is not necessary. An additional measure is cash forfeiture; criminal law enforcement authorities are allowed to recover forfeited cash in civil proceedings. A conviction is also not necessary.

Second, other Member States describe the possibility of applying administrative measures to seize criminal assets (the Czech Republic, England and Wales, Germany and Italy). In the Czech Republic, criminal assets are seized mainly under criminal law, but assets can also be seized within the scope of administrative law. The relevant measures are not necessarily linked directly with policies on combatting crime. First of all, forfeiture of items can take place within the scope of the Czech Misdemeanour Act under certain circumstances, if the item is related in some way to the misdemeanour (see Section 12.4.2.2.3). Moreover, specific authorities and inspectorates monitoring certain sectors have powers to seize items if the market, consumers or public health so require. Examples are the powers of the Czech Trade Inspection Authority, which can seize and subsequently destroy or disperse goods that are not in compliance with the applicable regulations. Other inspectorates, such as the Czech Agriculture and Food Inspection Authority, have similar powers.

In England and Wales, tax measures can also be used to seize criminal assets on a non-conviction basis. They are applied when there is little or no proof that assets were gained illegally. The NCA can also use some idiosyncratic measures to seize the proceeds of crime. These include financial reporting orders, which oblige a person convicted of certain offences to report their financial activities for a period of up to twenty years. The public prosecutor issues the order. There are other, broadly used serious crime prevention orders; they include

various measures taken against persons convicted of certain types of serious organized crime, including financial measures.

In Germany, the seizure of assets is possible under one particular type of instrument: the prohibition against an association. This is a serious measure that is applied when associations aim to contravene criminal law or the constitutional order. The prohibition order allows the association's assets to be seized and confiscated so that its (former) members are unable to establish a new association using the same financial means. This instrument has been used to prohibit certain outlaw motorcycle gangs in Germany.<sup>104</sup>

Italy has several measures under administrative law that allow for the confiscation of criminal assets. Compared with the other selected Member States, Italy's system of seizure and confiscation of criminal assets is much more advanced. This set of preventive and personal measures was most recently amended by the new Anti-mafia Code. Under this complex system, both criminal confiscation and confiscation under administrative law are possible. For the purposes of comparison, we will discuss all categories of measures, regardless of their legal qualification. First of all, there is criminal confiscation. Criminal proceedings, including the burden of proof, applies in full. A link between the offences and the assets must be proven. Second, there is the option of extended confiscation in the context of criminal proceedings. This can be imposed on persons convicted of certain types of offences related to organized crime. Here, the burden of proof is reversed: instead of the prosecutor proving the origin of the assets, the person in question must explain assets that are disproportionate to his income from legal sources. It is not necessary to prove a connection between the assets and any criminal activities. Third, there are two other forms of administrative confiscation: (1) preventive confiscation and (2) equivalent confiscation.

Preventive confiscation can be applied outside the scope of criminal proceedings, without a conviction being necessary. However, it is up to law enforcement authorities to utilize the measure, under the judiciary's supervision. The measure can be imposed not only on the person under direct investigation but on also his relatives and other persons with whom he associates regularly as well legal persons to which he is in some way connected. The assets can be confiscated if they are linked with criminal activity or if the person cannot explain the disparity between his legal income and the value of the assets. Equivalent confiscation is possible if the original assets can no longer be confiscated but their equivalent value can be recovered from a person's other assets.

Based on the foregoing, several observations can be made regarding the seizure of assets outside the scope of criminal law, since such measures overarch the legal qualification of criminal, civil or administrative law.

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104 Interview LKA Stuttgart, April 2014.

Some of these measures are specifically intended to target criminal activity but can also be employed more broadly. This is especially true of lien and sequestration in Sweden and to some extent of the measures used in the Czech Republic. Moreover, although the measure of civil recovery in England and Wales is qualified under civil law and the measures imposed under the Anti-mafia Code in Italy are categorized under criminal or administrative law, they have some similarities. First of all, several measures can be applied without demonstrating a direct link with a conviction (England and Wales: civil recovery and taxation powers; Italy: extended confiscation, preventive confiscation and equivalent confiscation).

Furthermore, to facilitate the enforcement authority, the burden of proof differs from that applied in criminal proceedings. This can either be a reversal of the burden of proof (Italy) or a lower standard of proof (England and Wales). The standard of proof has also been lowered in some criminal proceedings related to the seizure of assets (the Netherlands).<sup>105</sup> Compared to the system in England and Wales, the Italian system is distinctive in that the asset recovery investigation concerns not only the subject but also the persons and companies with which he is directly linked. This is specifically imposed to combat straw persons and counsellors.

#### 12.4.4 Other measures

The authors of the country reports were asked to discuss any common measures beyond the above three categories that the selected Member States included in their national administrative approach to crime. The exploratory nature of this research demanded an all-inclusive category of this kind. The authors of the country reports were allowed to provide an inclusive view of their legal systems.

It is important that these measures should not be seen as less significant than the measures discussed above, as they may represent important tools in a Member State's administrative approach. The category 'other measures' is merely a methodological choice, since screening, public order and asset recovery instruments constituted the starting point for our research, inspired by the Dutch administrative approach and the *Hungary Handbook*.

The above query resulted in descriptions of some distinctive measures<sup>106</sup> that cannot be compared simply because they apply only in a specific Member State. Important examples are:

- *Italy: dissolution of city councils*
- *Czech Republic: residence prohibition*

<sup>105</sup> See Article 36e of the Dutch Criminal Code.

<sup>106</sup> Although not all of the reports actually discuss other instruments.

- *the German prohibition of association*<sup>107</sup>
- *Poland: blocking of bank accounts*
- *Germany and France: area prohibition for prostitutes*

Some country reports mentioned measures in the ‘other’ category that can be compared with the measures mentioned under the first three categories, specifically public order competences, screening, or seizure of assets. For example, the country report on the Czech Republic mentions certain powers of inspection by the health authorities that could be included in the section on public order. Where applicable, these measures have been incorporated into the above sections.

While analysing the country reports in detail, we also identified certain specific measures that are present in more than one selected Member State (and can thus be compared).<sup>108</sup> These are instruments that are used in the scope of money laundering.

In essence, instruments that tackle money laundering implement the EU Money Laundering Directives,<sup>109</sup> which in turn are based on the Financial Action Task Force (FATF) recommendations.<sup>110</sup> The presence of such instruments in the context of an administrative approach to crime was discussed in the reports on Spain, England and Wales and Poland. The implementation of the EU provisions in the national legal systems is very similar in these countries, consisting of a system of reporting and monitoring. Certain financial institutions, such as banks, are obliged to report suspicious activities to a monitoring authority, which is authorized to license and register relevant institutions in compliance with Directive 2005/60/EC.

Under the Money Laundering Directives, all of the selected Member States have established FIUs to monitor and share information on money laundering via FIU-NET.<sup>111</sup> The possibility of sharing information about suspicious financial transactions in the EU and the potential of this network to exchange information in support of an administrative approach will be discussed in Chapter 14.

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107 The possibility of seizing assets administratively under this instrument is discussed in Section 12.4.3, however.

108 Although the country reports do not always cover these measures in the ‘Other measures’ section.

109 Directive 2005/60/EC on preventing the use of the financial system for money laundering and financing terrorism (3<sup>rd</sup> Anti-Money Laundering Directive); Regulation (EC) No 1781/2006 on information on the payer accompanying transfers of funds and Directive 2006/70/EC. In February 2013, two new proposals were adopted by the Commission to update and improve the existing directives. See: [http://ec.europa.eu/internal\\_market/financial-crime/legislation/index\\_en.htm](http://ec.europa.eu/internal_market/financial-crime/legislation/index_en.htm).

110 [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf).

111 <https://www.fiu.net/home/parties-involved>.

## 12.5 DUE PROCESS

An individual or legal person subject to the instruments discussed above also has recourse to certain legal safeguards protecting him or it from unjust decisions by government. Article 6 of the ECHR, fair trial, is applicable in each selected Member State, including in administrative proceedings. Administrative procedures basically fall within the scope of ‘civil rights and obligations’, making all the safeguards of Article 6 paragraph 1 applicable.<sup>112</sup>

The various country reports discuss safeguards related to the above-mentioned administrative instruments either in a separate general section or in the sections on the separate instruments. We will compare these safeguards below.

All the selected Member States adhere to general principles for safeguarding natural or legal persons subject to administrative decisions. In some Member States, the safeguards fall under general administrative (procedural) law (Sweden, Germany, the Netherlands, Spain), whereas in others, these principles can be derived from the vast array of subject-specific administrative regulations (the Czech Republic, France) or case law (England and Wales, Belgium).

Several general principles can be identified in the various phases of administrative procedure applicable to administrative decisions in the selected Member States. In each country, the administrative authorities must conduct the procedure in an appropriate and timely manner. Moreover, the administrative authorities are obliged to inform the person about the procedure and his rights and duties, and they must also adhere to the principles of necessity and proportionality.

One key feature in the selected Member States is the right to a fair hearing prior to a negative administrative decision. The reports on Belgium, France, the Czech Republic, Sweden, Germany and the Netherlands discuss this explicitly. The relevant party has the right to communicate his views on the matter to the competent administrative authority. Under certain circumstances, this may even be an obligation (Germany). There are exceptions to the right to a fair hearing, for example when the administrative authority is already familiar with the relevant party’s opinion (Belgium, Germany, France). This right to be heard allows the person to enter their own arguments regarding the facts and the intended decision or measure. This may avert what would be a negative decision for that person. The right to a fair hearing reflects the care with which the administrative authority should take its decision.

When an administrative authority takes a decision, it has an obligation to state the reasons underpinning that decision.<sup>113</sup> In Sweden, for example, the decision must include

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<sup>112</sup> Barkhuysen & Van Emmerik 2006, p. 130-131.

<sup>113</sup> Not all of the country reports discuss this explicitly. During several interviews in the selected Member States, however, it became abundantly clear that this is a common feature of the relevant Member States’ national administrative law. See: De Moor-van Vught 2013, p. 626-627.

the reasons leading to the outcome of the decision. In Belgium, this obligation breaks down into a substantive and a procedural part. This means that the decision must be based on sound reasons (substantive) and that the motivation must be given in the decision (procedural). In Germany, the administrative authorities must state the reasons for their decision as well as the sources of information on which they have based that decision. A general obligation to state reasons is theoretically not present in France. Nevertheless, law regulates the duty to state reasons for many types of decisions, amongst others (1) decisions deviating from general rules laid down in law or regulations, (2) when it concerns decisions which – for instance – restrict civil liberties, constitute a police measure or impose a sanction and (3) when an individual administrative decision creating rights is withdrawn or revoked.

The obligation to state reasons can be problematic in the quest to introduce a policy-driven administrative approach to crime in the selected Member States. As discussed, such an approach assumes information-sharing between administrative and law enforcement authorities. This information-sharing is essential to a functional administrative approach to crime.<sup>114</sup> However, law enforcement authorities may be reluctant to share information because the administrative authorities' obligation to state the reasons for their decisions – i.e. to make these known to the person involved – could undermine the case being built by the police and judicial authorities.

The Netherlands has experience with this issue and it would therefore be useful to briefly consider the solutions posed by the BIBOB legislation. First, administrative authorities are allowed to request information from several open and semi-closed sources themselves, including a person's criminal history. However, they *cannot* access sensitive police and judicial personal data, such as criminal intelligence, directly. If doubts remain about an applicant, more detailed information is required. As a safeguard, the administrative authority does not access certain personal data on its own, but instead asks the national Bureau BIBOB to review the applicant and advise. Several authorities are then obliged to provide Bureau BIBOB with information, such as the Tax and Customs Administration, the Social Affairs and Employment Inspectorate and the public prosecutor.<sup>115</sup> As an additional safeguard, however, the law enforcement authorities may refuse to cooperate if:

*this would be contrary to an important interest of the department or institution supplying the data*<sup>116</sup>

or if

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114 Fijnaut 2010.

115 Article 27 paragraph 1 BIBOB Act.

116 Article 27 paragraph 2 under b BIBOB Act.



*in the case of criminal investigation data, their supply would, in the opinion of the public prosecutor, having consulted with a public prosecutor designated by the Board of Procurators General, prejudice an important interest in connection with a criminal prosecution.*<sup>117</sup>

Furthermore, almost every recommendation issued by Bureau BIBOB is checked against relevant police and judicial information by the *Landelijk Parket*, i.e. the national public prosecutor's office in Rotterdam, before being sent to the administrative authorities. This check prevents information from being exchanged that could harm a criminal investigation.<sup>118</sup>

There are several remedies available to persons who are affected by a negative decision. In most countries, they have the right to lodge an appeal against the decision with the administrative authority (the Netherlands, Poland, the United Kingdom, Germany), an appellate administrative authority (Czech Republic), or a lower administrative court (Sweden, Italy). They may also appeal against this second decision (Poland, the Netherlands, United Kingdom, Sweden, the Czech Republic, Germany). Additional specific remedies are possible in England and Wales (judicial review), the Czech Republic (review and renewal of proceedings), and Belgium (appeal for nullity and suspension of the decision).

During the procedure, the person has the right to information (Spain, Germany, the Czech Republic, France, Sweden), both procedural and substantive, and to counsel (the Netherlands, Sweden, France, Belgium). The right to information and the right to counsel provide important safeguards in administrative procedures. In the Netherlands, the right to information and the recommendation of Bureau BIBOB has been the subject of debate. Until 2013, the counsel of the person in question was only allowed to review the recommendation on site; copies were not issued. There was much criticism of this rule, resulting in an amendment that allowed counsel to take a copy of the decision with him.

The procedures in the case of public procurement differ from the aforementioned. In principle, tender procedures come under private law, which means that the decisions taken by the administrative authority concerning tenders are also civil law decisions. The reports on the Netherlands and the Czech Republic discuss these matters separately. In the Netherlands, normal civil proceedings apply, including summary proceedings, unless the tender decision came under the public competence of the administrative authority. If so, then administrative law is applicable, invoking the procedures discussed above. In the Czech Republic, instead of an appeal, parties may lodge objections with the contracting authority and then petition the administrative authority's supervisory authority, the Office for the Protection of Competition.

<sup>117</sup> Article 27 paragraph 2 under c BIBOB Act.

<sup>118</sup> Interview at the *Landelijk Parket*.

In conclusion, various safeguards can be identified in the decision-making process, the decision itself, and the legal remedies against negative decisions in the selected Member States. Usually, these are based on normal administrative procedure as regulated by national law, with the exception of the Netherlands, which provides for specific legal protection of the individual by means of the BIBOB Act.

## 12.6 THE INSTITUTIONAL FRAMEWORK – THE NECESSARY INFRASTRUCTURE

### 12.6.1 *The responsible authorities in the selected Member States*

Based on the above sections, we can identify several authorities that are responsible within the legislative framework for implementing the relevant legislation in the different Member States. Even though some Member States have not (yet) implemented a national strategy, the legislation in each country provides grounds for preventing criminal activities. This allows us to compare the institutional frameworks in the selected Member States.

First, however, we wish to shed some light on the concept of the ‘administrative authority’. Although the concept seems relatively simple at first glance, prior research – particularly concerning international cooperation between administrative authorities – has shown that the definition of ‘administrative authority’ differs greatly from one Member State to the next.<sup>119</sup> For example, it is difficult to determine whether the concept includes the police force. In some Member States, the police have the power to maintain public order (‘administrative police’ or ‘municipal police’). However, they also have investigatory powers.

Nevertheless, the difference between these two roles is not always clear-cut and they may even be occupied by one and the same person in practice.<sup>120</sup> In addition, certain authorities are only regarded as ‘administrative’ in some Member States when performing a certain function. This is the case with garage owners in the Netherlands: they are private legal persons that have the administrative authority to decide whether a car is roadworthy after performing the annual roadworthiness test for motorized vehicles.<sup>121</sup> It would be going too far to discuss all the different types of administrative authorities, given the foregoing. However, in considering whether administrative measures play a role in tackling crime, it is important to know the kind of institutional framework in which the administrative authorities operate. Here, we have included administrative authorities in local, regional and national institutional frameworks that perform the same functions for the

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119 Klip & Vervaele 2002, p. 12.

120 Klip & Vervaele 2002, p. 12.

121 Article 83 *Wegenverkeerswet 1994* in conjunction with 1:1 *Algemene Wet Bestuursrecht*.

purposes of our study, i.e. screening and/or monitoring business activities, maintaining public order in their territories in the respective Member States, as well as authorities that may be of specific importance to an administrative approach to crime because they regulate certain vulnerable sectors.

In general, we found a three-way division into local, regional and national institutional frameworks in the selected Member States, with the exception of France and Italy where a four-way division in administrative structure exists.<sup>122</sup> However, if we consider what type of authorities are, or can be, responsible for an administrative approach to crime, we can distinguish between:

- a. countries that have assigned primary responsibility for executing administrative measures to local authorities and;
- b. countries where the primary responsibility for executing administrative measures lies with other authorities.

Examples of the first category are the Netherlands, Belgium, Spain and the Czech Republic. Local governments – mostly municipalities headed by a mayor, president or marshal – are specifically responsible for managing public order. This is, after all, a well-established responsibility of local authorities in general (see Section 12.4.2). Although that responsibility is not necessarily intended to combat organized crime, it can contribute to this aim. In some countries, such as Belgium and the Czech Republic, it includes the presence of a ‘municipal police force’ specifically assigned to maintain public order in the territory of the municipality. Municipalities are also the competent authority for granting, refusing and revoking licences for business activity in their territory, such as opening a bar and/or selling liquor. This is the case in the Netherlands, Belgium, the Czech Republic, Spain, Sweden and Germany.

Atypical in this perspective are Italy and France. Both countries have located the primary responsibility for executing administrative measures at the regional, instead of on the local level. Italy has assigned the prefect a leading role in screening applicants for licences, subsidies or tenders. Regarding public order in Italy, the competence is divided between the provincial head of the State Police and the local authorities, but the powers entrusted to them are largely similar to those of the local authorities in the other Member States. In France, considerable fragmentation in the administrative infrastructure allows for the existence of over 36.000 municipalities on French territory. As noted in the French report, most of these municipalities are too small to operate efficiently. Like Italy, key actor in the implementation of administrative policy and maintaining public order is the prefect of

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122 In France the municipalities, the departments and the regions exist apart from the central state. In Italy, the municipalities, the provinces and the regions exist apart from the central state.

the *département*, located on the regional level, instead of on the local level.<sup>123</sup> The prefect of the *département* even has exclusive competence in public order maintenance.<sup>124</sup> In doing so, he is also the head of the administrative police.

All the Member States have delegated powers to administrative agencies or inspectorates, which brings us to the second category. These agencies are usually only competent in certain specific areas, such as the environment or health. In England and Wales, such agencies, and not the regional or local authorities, bear primary responsibility for an administrative approach. In particular, the Home Office has established a national operational non-ministerial governmental department, the National Crime Agency (NCA), to fight serious and organized crime. Its strategy includes (but is not limited to) the use of administrative measures to combat crime. Compared with mainland Europe, this distinctive approach can be traced back to the common law system and its interpretation of administrative law in general, as discussed in the country report. In Poland, several national agencies have been established to deal with certain issues, such as weapons licences (for which the competent authority is the Minister of Internal Affairs). Other examples are the involvement of the Pharmaceutical Inspector and the Financial Supervision Authority. However, we do not wish to suggest that the primary authority lies solely with these types of agencies in Poland, since the local authorities are also competent to act in certain designated areas, such as the regulation of driver training centres, the distribution of alcohol, and the running of nurseries. Instead, the division of competences appears to be arranged by subject in Poland. The same is true for Sweden. Obviously, other Member States also have subject-specific inspectorates or agencies; examples can be found in the Netherlands, the Czech Republic and Spain. However, the primary responsibility for executing administrative measures in these countries lies with the local authorities.

An administrative approach can only be successful if it is implemented on a national level as well. The Ministries of the Interior are responsible for coordinating local authorities. In all the selected Member States, the local authorities fall hierarchically under the respective Ministries of the Interior, with the exception of England and Wales. There, local government falls under the Department for Communities and Local Government.<sup>125</sup>

Since the administrative approach is complementary to traditional law enforcement, the Ministries of Justice in the selected Member States are important partners of the Ministries of the Interior when it comes to coordinating national policy on an administrative approach, specifically concerning information exchange between law enforcement and

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123 Not to be confused with the (current) 22 regions, soon to be 13, which are the largest territorial units in France.

124 Although the mayor of a municipality does have police powers, they are restricted to the municipal territory. Once the application of measures supersedes the territory of the municipality, the prefect of the department is the competent authority. Due to the small scale of most French municipalities this situation occurs frequently.

125 [www.gov.uk](http://www.gov.uk).

administrative authorities. As mentioned earlier, not every country has such a policy. If a given country were to develop such a strategy, however, it would need to ensure coordination and cooperation between the ministry responsible for the administrative authorities and the ministry responsible for the law enforcement authorities. The institutional context of the Dutch Ministry of Security and Justice is atypical in this regard. Before 2010, the Dutch Ministry of the Interior and Kingdom Relations was responsible for the policy on an administrative approach to crime. However, after the responsibilities of the Ministries were reorganized, the issue of 'security', including the administrative approach to crime, was transferred to the 'new' Ministry of Security and Justice, making it responsible for the integrated approach to crime. This did not eliminate the need for coordination with the Ministry of the Interior and Kingdom Relations, however. The responsible department in England and Wales also has an atypical institutional context. The Home Office, which is responsible for security and safety, bears primary responsibility for the approach to organized crime and determines the national strategy against serious and organized crime. Since England and Wales rely mainly on agencies to execute administrative measures, coordination with the Department for Communities and Local Government seems less pressing than in other Member States. Instead, coordination between the different agencies is of vital importance.

### 12.6.2 *Horizontal institutional frameworks for the purposes of collaboration*

When governments are considering implementing an administrative approach to crime, a fundamental concern is having the administrative authorities coordinate actions and exchange information with other authorities (e.g. law enforcement). After all, as we saw in the discussion on the legal instruments present in the Member States, police and judicial information, such as criminal antecedents, is particularly vital to administrative decision-making. The foregoing implies cooperation with the police and the judicial authorities in a Member State, as well as with other authorities.

One critical factor is legitimate access to criminal law enforcement information. Apart from the legal difficulties involved in sharing information horizontally between different authorities, horizontal institutional frameworks are necessary to facilitate coordination and cooperation between authorities. Some of the selected Member States have established such horizontal frameworks. Below, we begin by describing existing horizontal frameworks in the selected Member States and then analyse the countries that lack such frameworks but have opportunities to establish them.<sup>126</sup>

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<sup>126</sup> We were unable to determine from some of the legal reports whether such bodies exist and whether there are opportunities to establish them at a certain government level. However, this does not rule out the possibility of informal cooperation in practice, a matter that will be discussed in the empirical report.

In Sweden, the various authorities have collaborated since the 1970s. In the 1990s, this resulted in specific collaborative bodies being established at regional/provincial level to enhance cooperation between several Swedish authorities, including the police, the Swedish Enforcement Authority, the alcohol-licensing authorities, and so on. These bodies are primarily meant to inspect local restaurants for infringements. The authorities that make up these bodies are thus able to set up coordinated actions. Each authority can wield its own powers during such inspections. Nowadays, there are similar cooperative bodies for social security benefits, including such authorities as the Swedish Social Insurance Agency, the Swedish Pensions Agency, and the municipalities.

In England and Wales, the current policy on organized crime stresses inter-agency collaboration or ‘partnership-working’. On a strategic level, the recently established Government Agency Intelligence Network (GAIN) combines several key players in the fight against organized and serious crime. Regional Organized Crime Units (ROCUs) have also been established, which facilitate information-sharing between agencies and government departments. The ROCUs are supported by GAIN. On a local level, there are multi-agency approaches to tackling crime and disorder. These approaches differ in terms of their aims and the authorities involved per local initiative.

In France, Regional Intervention Groups (RIG) exist which are mainly intended to seize illegally obtained assets. Currently, 37 RIGs exist at the regional level in France. The RIGs allow for the exchange of information between amongst others police authorities, tax officials and customs.<sup>127</sup> Cooperation also exists with authorities specifically dealing with financial crimes, such as Tracfin. Information-exchange is facilitated by access of the members of the RIGs in the databases of participating authorities.

Last, in the Netherlands, ten *Regionale Informatie en Expertise Centra* (RIEC) were established to help the municipalities implement the Dutch administrative approach to crime, boost their information and knowledge position and facilitate regional cooperation. In 2011, the RIECs were joined by the *Landelijke Informatie en Expertise Centrum* (LIEC), which is the link between the Ministry of Security and Justice’s policies and the RIECs’ operations. The RIECs and the LIEC are based on special covenants concluded between the cooperative partners, including municipalities, police, the Tax and Customs Administration, the Public Prosecution Service, and many more.

Looking at the established horizontal frameworks in the selected Member States, we can make a couple of remarks at this stage, based on the legal country reports. First of all, the reports mention the horizontal frameworks but often fail to explain the legal basis for these collaborations. From the information we have obtained, that basis is often provided by agreements between the collaborating partners. It is therefore unsurprising that the

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127 Presentation by French representatives of RIG in the context of the meeting “working apart together”, 15 October 2014 in The Hague.

reports do not contain detailed descriptions of these agreements, since this would have gone beyond the remit of this exploratory study. However, a commonly held notion is that the collaborative bodies are meant to: a) facilitate information-sharing between the partners *to the extent that legislation pertaining to the various partners allows* and; b) coordinate actions between the different partners, with the partners *acting on the basis of the powers delegated to them in compliance with their own legislative framework*. Last, based on the limited information provided by the legal country reports, the partners collaborating in these frameworks are not confined to administrative or law enforcement authorities. Cooperative bodies established to tackle crime and disorder in general may also include tax and custom authorities, immigration authorities, welfare authorities, youth services, emergency services and many others. In such instances, the aims of the collaboration are often broader than simply tackling crime by administrative means, with the exception of the RIECs in the Netherlands.

Even though we did not identify a structural horizontal framework for collaborating authorities in the other selected Member States, this does not imply that the authorities there do not cooperate at all. If these Member States were willing to implement formal horizontal frameworks, they would already have the institutional context to do so. At the very least, the municipality, the police and the public prosecution service in each country would need to exchange information. In Belgium, for instance, it would be possible to implement structural collaboration between various authorities at the provincial level within the context of the provincial deliberations. This would be complementary to the province's responsibilities in maintaining public order.<sup>128</sup> In Italy, the same role could also be embedded at the provincial level, within the context of the prefect's executive responsibilities. The Czech Republic has a network of different Trade Licensing Authorities (TLAs). Other authorities have a legislative duty to inform TLAs if trading infringements are found. However, there is no organized, structured framework. In France, it could be possible to extend the scope of the RIGs to encompass more than the seizing of assets. Finally, Germany has a multi-agency alliance for tax matters. Public prosecutors, customs and financial administrators cooperate in this structure. Cooperation between the *Landeskriminalamt* and the administrative authorities could also be embedded.

In Part III we discuss the administrative approach in practice, including how different authorities and departments in the selected Member States collaborate on either a formal or informal basis and what trends we can identify in cooperation.

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128 Van Daele et al. 2010, p. 442.

### 12.6.3 *National information databases*

The selected Member States have databases containing the criminal history of natural and legal persons; these are meant to assist the judicial and police authorities in taking decisions based on criminal backgrounds. These databases are of vital importance to the administrative authorities when they are taking administrative decisions. Usually, when someone applies for a licence, contract, job or authorization to conduct business, a background check is necessary (to some extent) to appraise his or her suitability for that position. Knowledge of a person's criminal history is essential in that regard. The flow of information from judicial and police authorities to administrative authorities is the key to implementing an administrative approach to crime, and if an EU administrative approach to crime were to be instituted, this type of information would also need to be shared across borders. Obviously, privacy and other fundamental rights would need to be safeguarded properly. For an overview of the potential for cross-border information exchange, we refer to Chapter 14. Here, we review the available criminal history databases, including police and judicial information. Our review compares the authorities responsible in each selected Member State and the contents of the various databases (police, judicial, both or more) and reveals whether the administrative authorities can access these databases and, if so, how and to what extent.

Each selected Member State has databases containing criminal records, i.e. judicial information. The authorities that bear primary responsibility for the national databases are the respective Ministries of Justice. In Sweden, however, the National Police Board manages the information. In the United Kingdom,<sup>129</sup> the Home Office manages the Police National Computer, whereas ownership of the information lies with the Association of Police Officers.<sup>130</sup> Finally, in Italy the Ministry of the Interior is responsible for the National Anti-mafia Database.

The contents of the databases differ per country. In some countries, such as Spain (*Registro Central de Penados*), the Netherlands (*Justitieel documentatiesysteem*), Germany (*Bundeszentralregister*), Poland (National Criminal Register) and Sweden (Police Criminal Records), the databases contain judicial information. They may also include information on decisions by the prosecution (the Netherlands) or wanted notices and detention on remand (Poland). In these countries, there are often other databases, for example containing police information on pending investigations or suspects. Examples of Member States that have separate police information databases are the Netherlands (HKS), Poland (National Centre of Criminal Information) and Sweden (Records of Suspected Persons).<sup>131</sup>

129 The Police National Computer is relevant for the whole territory of the United Kingdom, and not only England and Wales.

130 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/275136/PNC.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275136/PNC.pdf).

131 Other country reports did not provide information on such databases.



In other Member States, information on a person's final convictions can be found in the same database with other types of information. In Italy (National Anti-mafia Database), the Czech Republic (Penal Register) and the United Kingdom (Police National Computer), the databases contain more than judicial information alone. For instance, in the United Kingdom, the Police National Computer holds several other types of information, including information on pending prosecutions, warnings and vehicle information.<sup>132</sup> In Italy, the National Anti-mafia Database contains information on on-site checks performed by the prefect, personal and precautionary measures outside the scope of criminal law, and financial information on persons.

Access to the information contained in the databases is possible when provided for by law. The law enforcement authorities naturally have access to the information in the national criminal databases. However, in some selected Member States, the administrative authorities can also access the information in the national databases. A distinction can be made between (1) administrative authorities having direct access to the substantive information contained in the databases, (2) authorities that can access the information at the request of the national authority, and (3) authorities that can require an applicant to add proof that he has a clean criminal history to his application before taking an administrative decision.

Sweden is the only country that allows the administrative authorities direct access to the Police Criminal Records. However, administrative authorities can only access the database when that is specifically provided for by law. Permission may be granted if a law requires an assessment of the applicant's conduct before a licence may be granted. That law also determines the type of access – full or limited – to the Police Criminal Records.

Direct access is not possible in the other Member States, but the authorities are allowed to request an excerpt of a person's criminal history from the central database. Again, this is only possible when provided for by law. That is the case in the Czech Republic and Poland. In the Czech Republic, the requests and responses are arranged by electronic means. Access to the information is contingent on the purpose of the request. In the United Kingdom, the relevant authority gains access to the substantive information via the Disclosure and Barring Service (DBS). In Germany, an administrative authority can obtain a certificate of good conduct on request. The certificate only covers certain types of offences; juvenile offences, for example, are excluded. In Italy, the prefect accesses the information and then recommends that the administrative authority take a particular decision; this means that the administrative authority has no access to the person's substantive criminal history.

In the Netherlands, administrative authorities can access information about a person's criminal past in two ways. First of all, the authorities can ask the *Dienst Justitiele*

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132 See: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/275136/PNC.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275136/PNC.pdf).

*Inlichtingen* for information. However, they can also ask the applicant for VOG (Certificate of Good Conduct). The applicant has to request the VOG himself and add this to his application. The COVOG, part of the Ministry of Security and Justice, then screens the judicial information, and – if necessary – police information. The COVOG assesses the applicant's suitability for the job. If he is deemed suitable, he will receive a VOG. The latter method is current practice in the Netherlands, placing this country in between the second and third categories. Spain, on the other hand, falls entirely in the third category. In the case of applications for certain licences or authorizations, the administrative authority – where provided for by law – can ask the applicant to add his criminal history to the application. This is the case for certain types of employment, public positions, types of licences and administrative authorizations.

Notably, in Belgium some administrative authorities are excluded from access to criminal records, most remarkably municipal administrative authorities. Other specific agencies do have access, such as the tax authorities and immigration services staff.

Some additional features of the databases important for this report are listed here. First of all, most Member States save the criminal history of legal persons in their national criminal records. In the Czech Republic, anyone may obtain an extract, but not a copy, of the criminal records of a legal person, since this is deemed to be public information. Second, in Italy the recent legislative changes on the anti-mafia front have allowed for the introduction of a 'single database'. This database will not only include a person's criminal history but will also create whitelists and blacklists of persons who may and may not contract with the Italian government.<sup>133</sup> Third, the introduction of ECRIS into the European legal system aims to ensure that information on foreign convictions is included in national databases. The country reports on Poland and the Netherlands specifically mentioned information obtained via this system. This does not imply that the other countries do not make use of ECRIS. After all, if ECRIS is implemented correctly, foreign convictions should be added to a person's criminal history automatically.<sup>134</sup>

Finally, the country reports mentioned other databases used by the administrative authorities in the selected Member States when assessing a person's suitability in an administrative decision. First of all, we refer to Section 12.4.1.5 concerning trading bans. Examples of databases that list trading bans are ROLECE (Spain) and REPPC (the Czech Republic). Second, still other databases contain useful information for administrative authorities. In Sweden, information on debts and tax information may be requested from the Swedish Enforcement Agency at any time for any purpose, as these are public records. In the Netherlands, the administrative authorities have access to open sources and certain closed or semi-closed sources, such as the Municipal Personal Records Database (GBA),

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133 Interview, Prefettura Rome, 23 September 2014.

134 With the exception of countries that object to this automatic transfer.

the Chamber of Commerce and the tax authorities. The Polish country report mentions that the Central Registry and Information about Economic Activity (CRIAEA) and the National Court Register are of importance when registering entrepreneurs. All entrepreneurs, regardless of their specific economic activity, requiring a licence, concession, permit or other type of permission by an administrative authority are obliged to register with these databases. The CRIAEA is the register for natural persons and managed by the Ministry of Economic Affairs, whereas the National Court Register encompasses legal persons and is maintained by the district courts. Both registers are public and therefore accessible for administrative authorities. Also, the data that has been entered by the registering party is compared to the data in the National Criminal Register, bringing sentences and prohibitions against conducting certain activities to light. If a natural or legal person is convicted by a court or barred from certain activities, registration can be refused.

## 12.7 CONCLUDING REMARKS

This chapter provided a comparison of the administrative approach to crime in the selected Member States. The overview first looked at the current policy of the Member States, the general features of the applicable administrative law, the actual instruments that are used and the institutional framework in which this takes place.

The main question was *‘What role do administrative authorities in EU Member States play in tackling serious and organized crime?’*

First, the above sections show that each selected Member State has instruments at its disposal that could contribute to an administrative approach to crime. It is however important to understand that those instruments have not necessarily been put in place to actively prevent criminals from misusing the legal infrastructure. Instead, they are meant to prevent misuse of the legal infrastructure in general. This does not imply that these instruments cannot be used in this manner in future. What follows from the legal comparison is that some Member States have made extensive use of the administrative approach, whereas others are currently in the process of discovering its added value.

This brings us to the second important finding of this study. Most countries do not have a general policy supporting an administrative approach to crime. We can explain this by pointing out that administrative measures are not regarded as essential to preventing crime, or were not seen that way in the past. Combined with the subject-specific and geographical focus of administrative law, these two factors explain the highly fragmented nature of the present instruments in the selected Member States. As we have seen, the

instruments are somewhat less fragmented in Member States that have a policy-driven approach.

The Member States that do not pursue a policy supporting an administrative approach consequently also lack the institutional context for such an approach. That is otherwise in the Member States that are pursuing an administrative approach to crime in their policy. Here, the measures encompassed by such an approach are reflected in the national, regional and local framework as well as in horizontal structures for information exchange and coordination between law enforcement and administrative authorities. Horizontal cooperation between several types of government authorities is common to all the selected Member States, however. Future efforts to introduce an administrative approach to combatting crime could make use of such frameworks.

Nevertheless, there is considerable potential in the selected Member States to prevent crime by administrative means, usually within economic sectors that are deemed as high-risk. It is only logical that when deciding to grant licences, subsidies or tenders, local governments would want to prevent misuse by criminals or act when public order is disturbed. Screening someone's criminal history, for instance, is nothing out of the ordinary. In addition, the necessary requirements for due process and protection of the individual in the face of administrative decisions are present and ingrained in the legal systems of all these countries. The above implies that the introduction of new measures is unnecessary, and might even frustrate on-going developments. Instead, it would be more sensible to explore and implement existing measures.

Moreover, coordination and cooperation between administrative and law enforcement authorities must be encouraged, along with the potential for information exchange. As highlighted above, information exchange between these types of authorities is vital to the success of an administrative approach to crime. As we have seen, some countries already have a horizontal framework that facilitates information exchange between different government authorities, and could serve as an example for other Member States.

In part III, the workings of the legislative framework described will be discussed. It will focus on the application of economic business regulations in practice. Furthermore, the way different authorities work (apart) together in order to tackle crime problems in their area will be discussed. Furthermore, local and regional initiatives that address permanent bodies and long-term projects aimed at the exchange of information, intelligence and coordination of efforts to deal with criminal activities is considered.

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**PART III**  
**THE ADMINISTRATIVE APPROACH IN**  
**PRACTICE**



## 13 PRACTICAL APPLICATION OF THE CONCEPT

*A.C.M. Spapens & M. Peters*

### 13.1 INTRODUCTION

Part III addresses the practical application of the ‘administrative approach’ concept in the ten selected Member States. As we have seen in the previous parts of this report, the term ‘administrative approach’ covers a broad range of activities and instruments. Generally, we can distinguish three types of measures and cooperation aimed at preventing and combating organized crime. These three overlap to a certain extent.

The first is the use of business regulations to prevent persons with a criminal background, or persons who can be linked to organized crime groups, from entering specific types of business or economic activity in general. As shown in Part II, all the selected Member States have legislation in place that excludes from business activities individuals who are unable to demonstrate their ‘good conduct’, which implies at least the absence of a criminal record with regard to specific offences and in a given period. Some Member States, Italy and the Netherlands in particular, screen applicants for government contracts and specific licences more extensively. The BIBOB screening procedure in the Netherlands, for example, may even include police intelligence on an applicant’s criminal activities or contacts obtained from undisclosed criminal informers.

Second, the concept covers the fight against organized and other crime problems by means of administrative measures only, or through the cooperative efforts of law enforcement agencies and administrative bodies. The latter may for example carry out sanitary inspections of businesses, impose fines and even revoke licences if local and business regulations have been infringed. In some countries, the local authorities can close premises that cause nuisance. A step further is coordinated action between different government agencies against a specific location or a crime problem, which we can define as ‘working apart together’.

Finally, ‘working apart together’ can be organized more systematically within the context of long-term projects or in permanent/semi-permanent bodies. This may take the form of a task force or agency to which staff from various public bodies are seconded. One example is the Italian Anti-mafia Directorate, which encompasses four Italian law enforcement agencies. Another is the Dutch Regional Information and Expertise Centres, in which the police, the public prosecution service, the tax authorities and the local

administrative authorities have representatives. Such cooperative efforts may be organized at the national, regional or local levels.

Chapter 13 of the report is structured as follows. Section 13.2 addresses the application of administrative regulations to prevent criminal infiltration in economic sectors. Section 13.3 then focuses on parties ‘working apart together’ to tackle specific problems in the context of crime or public order. Section 13.4 addresses permanent/semi-permanent bodies meant to exchange information and intelligence and coordinate efforts to tackle crime problems. Section 13.5 concludes the chapter.

### **13.2 APPLYING ADMINISTRATIVE REGULATIONS TO PREVENT CRIMINAL INFILTRATION**

#### *13.2.1 Introduction*

This chapter addresses the first manner in which administrative regulations are applied in the context of crime, i.e. to prevent individuals and legal entities that have criminal records or can be linked to organized or other crime obtain licences to operate a business or to gain public contracts. Section 13.2.2 briefly addresses the basic application of business regulations and 13.2.3 focuses on regulations to prevent public order disturbances. Section 13.2.4 analyses examples from Italy and Sweden of the screening of natural and legal persons in the context of public procurement. Section 13.2.5 addresses BIBOB screening in the Netherlands, which offers the option of conducting extensive background checks on individuals and legal entities that wish to obtain government contracts and subsidies, but also on those who are applying for a permit for selected economic activities.

#### *13.2.2 Use of business regulations to prevent crime*

The legal studies (see Part II) showed that all the Member States investigated in this project have administrative legislation in place that sets requirements for entrepreneurs and for the running of specific businesses. A customary basic requirement is that anyone who wishes to start up a business must not have a criminal record of offences that could influence his or her competence to engage safely in the activity. Such restrictions may also apply to employees, for example staff who work with children and taxi drivers (see below). If the licence holder is a legal entity, the requirements concern members of the management and supervisory boards. Background checks are more extensive when the economic activities present bigger risks, for instance to safety, health or the environment. In addition, businesses operating in these areas are also regulated more strictly.

The EU has adopted two specific business regulations that require the absence of a criminal record. To begin with, there is Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC. Under this regulation, transport managers must not have been convicted of a serious criminal offence or have incurred a penalty for a serious infringement of Community rules relating to road transport in particular. This was followed in 2011 by Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating sexual abuse and sexual exploitation of children, and child pornography, replacing the Council Framework Decision 2004/68/JHA. This Directive states that a person convicted of a number of specific offences ‘must be prevented from exercising employment involving direct and regular contact with children’.

General regulations in most cases are not specifically aimed at ‘keeping out criminals’ but primarily at ensuring the proper functioning of a business. Someone who has been convicted of document fraud may be less trusted with his or her bookkeeping, for example. Several interviewees explicitly mention the need to maintain a balance between offering citizens the opportunity to start a business on the one hand and imposing restrictions on the other. In Spain and Italy for example, interviewees stated that reducing the number of hurdles for potential entrepreneurs became particularly important after the financial crisis hit in 2008. Most notably in Poland, the Czech Republic and Spain, severe restrictions on the free market are a sensitive issue because of these countries’ experiences under communism and the Franco regime.

Efforts to prevent a business from being misused for criminal activity is official policy only in the Netherlands and Italy (in procurement procedures) and England & Wales. The UK Serious and Organised Crime Strategy, for example, states that ‘wherever we can, we will prosecute those involved in serious and organised crime. But where we cannot, we will look to deter and disrupt engagement in organised crime with a wide range of interventions that complement and, where appropriate, offer an effective alternative to criminal investigations.[...] Licence conditions are an important part of this toolkit: they require offenders leaving prison following the custodial part of a sentence to follow certain requirements based on a case by case assessment of risk.’<sup>1</sup> This could imply issuing a ‘Director Disqualification Order’ to ban a convicted criminal from operating a business.

Apart from policies at the national level, local authorities may also formulate guidelines for extensive background checks. In Gothenburg for example, the licensing unit (*Tillståndsenheten*) performs such checks on natural and legal persons applying for licences to sell alcohol, non-prescription medicines and tobacco. The screening procedure takes approximately 15 weeks and applies to new applicants and to licence holders if the ownership

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1 HM Government 2013, p. 51.

changes, for example. The applicant must provide all sorts of data, such as a financial and business plan, a fire prevention plan and his or her qualifications to run the business. The unit also consults with other agencies and private parties such as banks. The opinion of the police weighs particularly heavily on the decision to grant the licence. Also important is the financing of the business, because a lack of transparency in this respect may also result in the application being rejected. It is, however, difficult to establish whether the applicant is a straw man, according to members of the unit we interviewed.

In each case, the exchange of information between law enforcement agencies and administrative bodies is crucial. As explained above, all the Member States studied here have legislation allowing background checks. However, the police or other government bodies may also have 'soft' information available. One example would be a woman whom the police know to be the girlfriend of a well-known drug dealer applying for a licence to operate a bar. While she herself has no criminal record, in most cases the local authorities would consider it undesirable to issue her a licence if they know of her relationship.

In Germany, local administrative authorities can request information from the police regarding applicants for certain types of licences. This involves licenses for working with weapons and explosives, when persons apply for visa and immigration related licences and persons applying to work in high-risk environment. To standardise these kinds of checks throughout the police services in Germany a federal project was started two years ago. A long running discussion in this project concerned the disclosure of 'soft' information by the police. In the end, it was decided that the original owner of the information, i.e. the (local) police force, has discretionary power to decide whether to disclose the information to the administrative authority.

If there is no legal framework to exchange such information officially, law enforcement agencies may 'informally' notify the administrative authorities, provided they are aware that a certain person intends to start a business. This requires regular contact between law enforcement agencies and administrative bodies. Because the information cannot be disclosed officially, an informal notification may not allow the administrative body to refuse a licence, but they can keep a closer watch on the business. This type of information exchange depends on personal relationships and mutual trust between the staff of various agencies, particularly trust in each other's integrity. If persons change jobs, for example, the contact persons may not be as willing to provide intelligence to their successors.

As will be explained in Part IV, there is no clear legal framework underpinning the cross-border exchange of criminal and fiscal information for administrative screening purposes. In the Dutch-Belgian border area for example, serious and organised crime is to a large extent 'integrated' because members of crime groups operating in the area often live on both sides of the border and execute parts of their 'criminal business processes' in

both countries.<sup>2</sup> In one example, a Belgian police chief was suspicious about a Dutch national who wanted to open a bar in a border town. He enquired informally with his Dutch police colleagues and learned that the person who had applied for a licence was indeed associated with a group of organized criminals. However, the Belgian authorities could not use this information in the licensing procedure because the Dutch authorities believe that existing treaties do not allow official exchanges of such information. Italy for example complains that its extensive antimafia screening of companies tendering for public contracts is problematic when a company originates from another Member State (see below). A public prosecutor in the Netherlands for instance refused to check the background of a Dutch company that applied for a contract relating to the Milan Expo.

Although a less strict interpretation of the existing conventions is possible, as we will show in Part IV, the lack of clarity hampers the prevention of serious and organized crime in an international context.

### 13.2.3 *Use of local public order regulations to prevent crime*

In most of the Member States studied here, the local authorities can take specific measures to maintain public order. Municipalities may regulate economic activities in local by-laws, for example, or use spatial planning for this purpose. Although public order is the main concern, local regulations can also be used to prevent crime. Here, we present two examples.

The Belgian municipality of Turnhout added a provision to its local by-law requiring *nightshops* (small groceries that are open all night) to have a permit. This is because such shops may cause nuisance, with customers coming and going during the night and parking their cars on the road if they cannot find a spot near the shop. Because *nightshops* are also thought to be vulnerable to criminal infiltration, such regulations can help prevent crime by controlling the number of shops and avoiding concentrations of similar shops in one street or in a residential area with no parking space, for example.

In an example from the Netherlands, several municipalities set requirements for *growshops*. These shops sell all sorts of equipment for cannabis cultivation, such as growing lamps, electrical equipment, black earth soil, pots, fertilizer and materials to prevent detection, for example carbon filters to dispel the scent of cannabis. Selling these materials is legal and the owner does not require a permit to open a *growshop*. However, such shops are also known to advise cannabis growers on where to buy cuttings and sell their harvest.<sup>3</sup> Furthermore, criminal organizations involved in large-scale cannabis cultivation also run *growshops*. In response, several municipalities in the south of the Netherlands forbid such

<sup>2</sup> Spapens 2008a.

<sup>3</sup> Spapens, Van de Bunt & Rastovac 2007.

shops in specific areas in order to control their numbers and make it less attractive to open one.

#### 13.2.4 *Screening in the context of public procurement*

The foremost aim of regulating public procurement in the selected Member States is to ensure a transparent process and fair competition. Second, regulation is meant to prevent corruption, i.e. politicians and civil servants favouring specific entrepreneurs unfairly. Third, the screening process is supposed to prevent companies that are owned (wholly or in part) or infiltrated by members of organized crime groups from obtaining government contracts. This type of measure aims to prevent criminals from generating legitimate income as well as other offences they might commit during the work, such as labour exploitation and money laundering. Below, we describe two examples of measures aimed explicitly at preventing criminals from procuring contracts, as well as at ensuring a transparent and fair process: the *Gruppo Interforze Centrale per l'EXPO Milano 2015 (GICEX)* and the Nacka project in Sweden.

##### **The Milan Expo (Italy)**

Italy has adopted extensive legislation to prevent companies that are owned or have been infiltrated by mafia-type criminal organizations (or their members) to gain public contracts (see the country report on Italy). The Prefecture screens companies that wish to procure government contracts. Depending on the size and scope of the contract, anti-mafia documentation or information is required. The anti-mafia communication certifies that there are no grounds for disqualification, banning or suspension owing to a final preventive judgment, a preventive measure (with a final decision), or criminal convictions for specific offences. The anti-mafia information has a wider scope, and refers to any attempt by the mafia to infiltrate a company.<sup>4</sup> The prefect of the region where the company's headquarters is located is the competent authority in the screening procedure and issues the certificate.

In Milan, the Ministry of Economy and Finance, the State, the City, the Province and the Chamber of Commerce established the limited public company (*società per azioni*, S.p.A) Expo 2015 to govern the organization of the event. Expo 2015 also took extensive measures to prevent criminally affiliated companies from gaining contracts related to the Expo. The 'Committee for the surveillance of major works' is responsible for monitoring anti-mafia activities and for ensuring that all the main contractors and their subcontractors, consultants and other partners are qualified to do the job.

The *Gruppo Interforze Centrale per l'EXPO Milano 2015 (GICEX)* collects and analyses all information concerning building sites so as to detect money laundering activities or

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4 Calderoni and Di Stefano 2014, Chapter 7 of this volume.



the involvement of mafia-type criminal organizations in the project. The GICEX may also perform checks at sites. The group is made up of the *Direzione Antimafia*, the police, the *Carabinieri*, the *Guardia di Finanza*, the local labour directorate (*Direzione Territoriale del Lavoro*), the local health service (*Azienda sanitaria locale*, ASL), the national institute of social security (*Istituto nazionale della previdenza sociale*, INPS) and the national institute for insurance against accidents at work and occupational diseases (*Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro e le malattie professionali*, INAIL).

The screening and monitoring activities in the context of the Expo go beyond the normal screening procedure. First, the procedure covers all companies that take part in the logistics of the work, regardless of the value of their contribution, with the exception of catering businesses if the value of their activities does not exceed €50,000 in a three-month period. The underlying rationale is that the mafia has shifted its attention to facilitating construction work, for example by leasing trucks and machinery to bona fide construction companies. In addition, companies that are considered to run a higher risk of mafia infiltration, for example those active in waste disposal, the supply of soil, and the transport of concrete, bitumen and asphalt, are subject to the mafia information procedure, regardless of the value of their contracts. Second, the Prefecture of Milan is the competent authority for all companies contracted to work on the Expo, regardless of the regional location of their headquarters. Third, the GICEX also encompasses national bodies and can thus acquire the information necessary for screening and monitoring from all of Italy. Fourth, every contract (and sub-contract) contains a clause providing for immediate contract termination on the establishment of mafia connections.

The GICEX also monitors the contracted companies during the execution of the work. Officials perform on-site checks of personnel to ensure that all the workers are employed properly and the companies are complying with the requirements following from labour and social security legislation. All information relating to the contracts, ownership structure and managerial accounts of the companies and their employees is registered in the *anagrafe degli Esecutori*.

In the past three years, there have been 48 cases in which the Prefecture banned a firm from working at the Expo. The bans involved 32 different firms and about half of these appealed against the decision. So far, all of the cases have stood up in court.

### **Procurement screening in Nacka (Sweden)**

Nacka municipality is a part of the greater city of Stockholm. The community has expanded rapidly over the past few years and now numbers 94,000 inhabitants. It will continue to grow in the near future. Its expansion has spurred extensive building activities. The Nacka project started in 2004 and aims to prevent criminally connected construction companies from obtaining contracts and to ensure that no illegal activities, for example labour

exploitation and tax evasion, occur at the building sites. In the future, the project will also focus on other economic sectors, such as restaurants, cleaning companies and taxi operators.

The Nacka project involves cooperation between the municipality, the Swedish Economic Crime Authority, the Swedish Tax Authority, the Stockholm Association of Building Contractors and *Byggnads Stockholm*, a trade union. The aim of the project is to contract only financially sound operators that have the expertise to provide goods and services of the desired quality. The contractors and their subcontractors must also have a clean record when it comes to paying taxes and other contributions. The procurement officers check whether the company is registered with the Swedish Companies Registration Office and the tax authorities, as well as for social security contributions. They also check whether it has outstanding debts with the Swedish Tax Authority and the Swedish Economic Crime Authority. Furthermore, the municipality checks the background of applicants against the criminal records held by the police. Operators that have been convicted of corruption, bribery, fraud or money laundering or are known members of criminal organizations are excluded from the procurement procedure. If the supplier is a legal person, these requirements apply to the representatives of that entity.

The contractors are obliged to comply with the requirements stated under the ID06 General Regulations. This entails that anyone working at the construction site must have a valid authorization card. The contractor must keep daily records on the persons working at the site for his own company as well as for subcontractors. These records and a specification of the tax returns for each employee must be sent digitally to the Swedish Tax Agency once a month. The contractor must also inform the tax authorities about subcontractors' activities. Subcontracting companies are required to comply with the ID06 General Regulations as well, and must also send a monthly specification of received tax returns to the Tax Agency for every employee. This allows the tax authorities to check whether a person who is registered as an employee working at a specific construction site actually works there. The municipality regularly checks whether the workers who are present at the building site have valid ID06 authorization cards. If irregularities are detected, the contractor may be fined but it is also possible to stop the work.

The Nacka project has now concluded and has received a positive evaluation. Contractors think that the procurement procedure helped 'level the playing field' and increased the expertise of Nacka municipality. Interviewees who were involved in the project observed that at least one large construction company refrained from competing for a contract. The project did not generate extra costs, fewer opportunities for smaller companies or less competition, although it did reduce the number of subcontractors hired. In practice, the companies adhered closely to the requirements. Interviewees mention a few cases in which the tax authorities did not receive information in time, which usually resulted in only a warning. This in fact shows that the project had its intended preventive effects, in their opinion. They did observe a problem with foreign subcontractors, however. Because anyone

can work in Sweden for a maximum period of three months, it is impossible to check whether the companies and their employees pay taxes in their home countries. The Swedish Parliament is now discussing whether the procedures should be included in legislation and thus become the standard for the entire country.

#### 13.2.5 *BIBOB screening in the Netherlands*

In the Netherlands, the Public Administration (Probity Screening) Act ('BIBOB Act') enables the administrative authorities to refuse or revoke permits, as well as tenders and subsidies funded by the government, if screening reveals a risk that an applicant will use the permit, contract or subsidy for criminal purposes. The legislation applies to natural persons as well as legal entities.

As explained in Chapter 8, application of the BIBOB legislation is the responsibility of the administrative authorities at the municipal or provincial level, depending on the type of activity. Apart from government contracts and subsidies, the BIBOB legislation only applies to economic activities that are considered vulnerable to criminal infiltration, such as bars and restaurants, gambling activities, and prostitution.

The screening procedure consists of two stages. First, the administrative authorities require the applicant to provide a range of information. He or she must hand in a 'certificate of good conduct' (i.e. showing the absence of a criminal record), and the business must have been registered with the Chamber of Commerce. The municipality may also ask for a business plan for the intended activity, how the applicant acquired the necessary capital, his or her tax records, as well as annual financial reports if the applicant is already engaged in economic activities.

This information may be sufficient to grant the permit. However, if the competent administrative authority suspects irregularities, it may ask the national Bureau BIBOB, part of the Ministry of Security and Justice, to perform in-depth screening. The district public prosecutor who is competent for BIBOB cases can 'tip' the administrative authorities if he or she holds information that the applicant may be linked to persons involved in organized criminal activities. Bureau BIBOB can request further information on the applicant from the police, the tax authorities and other public bodies, and even intelligence from undisclosed criminal informers whom the police classify as trustworthy. The national bureau then issues a recommendation in which it reviews the information collected and establishes the level of risk involved, i.e. the risk that the permit, contract or subsidy will be misused for criminal purposes (no risk, limited risk, high risk). The competent local or provincial authority then decides on this advice. In practice, if a 'high' level of risk is established, the competent authority will usually decide not to grant the permit, or to revoke it if it has already been issued.

Requesting a recommendation from Bureau BIBOB is considered an *ultimum remedium*. In 2013, the national bureau issued 268 recommendations.<sup>5</sup> Of these, 41 cases concerned an additional recommendation, issued after lawyers acting on behalf of an applicant contested the original report. Most concerned bars and restaurants (128), Dutch-style *cafeshops* (54) and sex businesses (15). In 2013, only two cases referred to procurement and the national bureau did not receive any requests concerning subsidies. Of the 227 new recommendations issued, in 131 cases Bureau BIBOB judged the risk of misuse to be high and in a further 37 cases the risk was limited. In another 37 cases, the requesting authority withdrew its request, usually because the applicant also decided to withdraw from the licensing procedure after the bureau started asking for additional information.

Although this is difficult to assess, the authorities believe that the instrument does have the effect of preventing persons who already suspect that they will not pass the screening from applying. If, however, there is no relevant police information available, it is difficult to conclude that granting the permit will pose a high risk of misuse.

### 13.3 WORKING APART TOGETHER AD HOC

#### 13.3.1 Introduction

Authorities can use administrative legislation not only to prevent illegal activities but also to repress them. Administrative authorities can put an end to crimes or public order disturbances by revoking permits and closing premises that criminals use. To begin with, authorities can apply such competences independently, as a follow-up to inspections revealing that the licence holder has contravened various regulatory or permit requirements. Administrative authorities can also cooperate with other public bodies and apply their respective competences in a concerted way. Finally, private parties may be able to contribute to interventions aimed at reducing crime.

This section starts with some brief examples of the interventions administrative authorities may impose based on their own competences (Section 13.3.2). Section 13.3.3 focuses on cooperation between administrative authorities and other public partners, particularly law enforcement. Section 13.3.4 then describes the Joker project, an example of the combined use of different competences to tackle illegal casinos in the Netherlands. Section 13.3.5 then presents practical examples of public-private partnerships and in particular the European Pol-PRIMETT project, aimed at reducing metal theft.

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5 Landelijk bureau BIBOB 2014.

### 13.3.2 *Administrative interventions*

Part II of this report gave an extensive overview of legislation in the ten Member States meant to regulate business activities so as to ensure public safety as well as local and other regulations aimed at preserving public order. Such regulations allow local authorities not only to prevent criminal infiltration, but also to take repressive action against businesses and premises.

To begin with, administrative authorities may receive information that a particular natural or legal person has been convicted in a criminal case. For example in Poland, if a person or a legal entity is convicted of a criminal or fiscal offence, this information is automatically forwarded to the National Crime Register and to other databases relevant for the issuing of licences, permits and the registration of economic activities. Depending on existing regulations, such information may enable the administrative authorities to revoke a licence.

In Germany for example, the authorities apply the *Vereinsverbot* to prohibit certain associations. Under this administrative measure, the police was able to prohibit around 15 different motorcycle gangs in the last two to three years. In a concrete example in Baden-Württemberg, two rival gangs caused several problems, leading up to a murder. Although the club had over 150 members of which only 15 had been involved, the association was prohibited, the assets were seized and the police closed the clubhouse, based on a decision of the competent administrative authorities.

In practice, however, signs of organized or other criminal activity will often be less clear-cut. The neighbours of certain premises may complain about nuisance because its owner rents it to people who stay there temporarily and may be victims of human trafficking. To begin with, the municipality may try to tackle the problem on its own account and redress the situation, for example because local regulations do not allow a private home to be converted into a hotel or to be divided up into separate rooms without a permit. In such cases, the administrative authorities may undertake inspections to establish whether the situation complies with various rules, including sanitary and safety regulations. Depending on the severity of the infringements and the options that specific regulations offer, the authorities can demand improvements, impose fines or even close the premises for a certain period.

Administrative enforcement may be time-consuming, however. It is primarily future-oriented and aims to repair violations rather than punish the perpetrator. Consequently, the administrative authorities must always offer the perpetrator the opportunity to make improvements before they can take decisive action. It is therefore only logical for the administrative authorities to enquire whether other government agencies hold information that can help them build a stronger case. If the police know that a person is affiliated with an organized crime group and that the tax authorities question the size of his legal income,

this information may enable the administrative authorities to revoke a licence immediately. In Italy, for example, the tax authorities may terminate a business when it reports losses for more than three years running and cannot explain why it accepts them.

Taking this approach a step further involves exploring the possibility of coordinated interventions by multiple administrative authorities, law enforcement and the tax authorities, based on their own respective competences. The knowledge that something may be wrong could trigger all of them to dig deeper into the case and undertake coordinated actions based on their respective competences. This is the concept of ‘working apart together’ that is typical of an administrative approach.

### *13.3.3 Cooperating with other public partners*

In practice, we can observe two main types of ‘working apart together’ in ad hoc cases. The first is to launch joint inspections in which relevant government agencies visit a business or premises at the same time to check compliance with the regulations that fall under their responsibility. The second is to exchange information that allows a partner agency to take action.

#### **Joint inspections and combining competences**

Interviewees in most of the Member States studied here were able to give examples of joint inspections. The agencies participating in these inspections differ depending on country-specific legislation. For example, the local administrative authorities in most countries check compliance with sanitary regulations, but in Spain this competence is allocated to the police. Generally, the interviewees see joint inspections as an effective tool. Thorough inspections almost always reveal shortcomings. Furthermore, if the local press starts writing about the case, customers will avoid certain businesses.

A good example is a ‘men’s club’ in the old centre of Warsaw where men could buy women drinks at exorbitant prices. The administrative authorities could not prove organized prostitution – ‘if the woman wants to go to a hotel with this man afterwards that is her own choice’ – and the prices of the drinks were correctly given on the price list. The local authorities tried another tack by launching sanitary and safety inspections; at the same time, the immigration authorities checked the status of the Moldavian and Ukrainian women who frequented the club, while the tax authorities checked whether the alcohol was legitimate and properly taxed. These inspections generated so much bad publicity for the club that the owners decided to terminate their business.

Joint inspections may also be cost effective. In Gothenburg, for example, the licensing unit performs about 1200 inspections of licence holders annually. In some of these cases, the inspections are conducted together with the police, the tax authorities, customs and

the fire department. Combining the respective competences can be very fruitful. For example, the municipality has all sorts of competences to access and check premises, including sending 'mystery guests' who pose as clients, and to seize goods, such as bottles of alcohol to check the alcohol percentage. Sometimes cooperation is more efficient, however. The tax authorities also check the goods that are being sold at restaurants. When they share their findings, it saves the municipality the cost of collecting and analysing its own samples.

In most cases, it is the local authorities that initiate joint inspections. In the city of Brno in the Czech Republic, interviewees explained how the local authorities had arranged informal meetings to discuss both preventive and repressive interventions with regard to metal theft and pawnshops. Such meetings can also be arranged if there is a threat to public order, for instance if right-wing extremists want to organize a demonstration. The municipality invites the relevant bodies to participate depending on the nature of the problem, such as the Trade Inspection, the Environment Inspection Agency, the police, customs and the sanitary service. Sometimes it also invites private parties, for example scrap metal yard operators in the case of metal theft.

The local authorities in the city of Antwerp combined competences in their battle against street prostitution. To begin with, the police can detain a person suspected of breaking the law administratively for a maximum of 12 hours. The police have used this regulation to arrest streetwalkers systematically. Prostitutes who had been arrested received an administrative restraining order banning them from certain streets. As a result, the police no longer needed to establish whether a woman was working as a prostitute to arrest her, which saved a lot of time and effort. These measures resulted in a 50 percent drop in the number of prostitutes. The authorities then targeted the customers. In Belgium, the local administrative authorities can issue 'municipal administrative sanctions' (*gemeentelijke administratieve sancties*) for minor violations, such as littering. Such sanctions were imposed on customers who drove around the area with the intention of picking up a prostitute. Although it was doubtful whether these sanctions would hold up in court, they did have an effect, particularly on married men, who could expect questions from their wives about the fine. Media attention also helped. Finally, hotels that systematically rented out rooms for short periods were named and shamed as facilitators. A number of hotels stopped renting rooms to prostitutes and several others were closed. Although these combined measures did not make street prostitution disappear completely, they disrupted the market to such an extent that the number of women declined from 60 to 80 per night to 2 or 3.

### **Acting on each other's information**

Joint inspections may provide each of the participating agencies with information on which it can act, but it may also be relevant for other partners. If the police have seized illicit drugs or illegal firearms while inspecting a bar, informing the licensing agency about this

will also be highly relevant. If the information is the result of a joint inspection, it will usually be exchanged officially. However, if the partner organization obtains such information in the context of separate enquiries, 'automatic' exchange is far from guaranteed. Problems occur specifically when law enforcement agencies and the tax authorities respectively hand over information to administrative bodies. The opposite flow of information presents fewer problems, as does the exchange of information between administrative authorities, although this may require specific agreements. In the context of criminal and fiscal investigations, all types of information may be requested from administrative bodies. Furthermore, all ten countries studied here have legislation requiring civil servants to proactively inform the appropriate law enforcement agencies if they receive information in the course of their regular duties that offences are being committed. In Poland, for example, the health inspectorate informed the public prosecution service that certain types of new psychoactive substances were dangerous to people's health. This information was subsequently used to charge the persons who sold these substances with causing permanent physical damage to an individual (Art. 156).

In turn, law enforcement information is often crucial in permitting administrative bodies to take action. In Spain, for example, interviewees explained how the local police – in Spain the police check compliance with safety, sanitary and other regulations as well as with the requirements of local licences – received information from the National Police that a particular restaurant was linked to an organized crime group under investigation. The check revealed the presence of illegal firearms. The police passed on the information to the local authorities responsible for licensing so that they could impose administrative sanctions.

In Germany, the police can also disclose information to the competent administrative authorities that allows them to take repressive action. For example, an organized motorcycle gang had permits for firearms. When one of the *Landeskriminalämter* (LKA) was informed about this, police officers drew up a report for the competent licensing authority to inform them that the persons involved should not be allowed to carry a gun because they could not be considered 'reliable'. Many licencing laws allow to withhold a licence when there are 'good reasons that allow to question a person's reliability.' As many as 248 members of organized motorcycle gangs under the competence of this LKA had a firearm license. In each of these cases, the relevant authority was requested to check the background of the person involved. So far however, only eight licenses have been withdrawn. The interviewees state that particularly the local authorities are not yet sensitive enough to crime problems and thus do not refuse licences to persons with a questionable background or withdraw these.

In other examples, however, law enforcement agencies were unaware that their intelligence was of importance to the administrative authorities. In the municipality of Nacka in Sweden, for example, the local authorities experienced problems with an outlaw



motorcycle gang that had acquired premises there. As it transpired, the police had information that would have enabled the local authorities to block the gang from opening a clubhouse but failed to share it. The only course of action open to the municipality was to buy the property. To discuss the case, the municipality arranged a meeting with the police and the Ministry of Justice, which made the law enforcement agencies more aware of the administrative powers of the municipality.

In the United Kingdom the National Crime Agency put together a 'Disruption Manual' intended to raise awareness within the police force of the competences of a wide range of partners and giving examples of how they could be used to disrupt criminal activities. According to the NCA Newsletter of January 2014, the 'Disruption Manual is a guide to a wide range of capabilities and specialist knowledge and is a living document to be shared and continuously developed in collaboration with our wider law enforcement partners.'<sup>6</sup>

Whether law enforcement agencies will share relevant information with administrative authorities depends not only on whether that is legally possible. Particularly in ongoing criminal investigations, the police and the public prosecution service may decide to wait until a suspect is convicted so as not to jeopardize their case before the court.

They may also refuse to share information because they do not trust the integrity of the public authorities, particularly those who are politically responsible. An example is an investigation several years ago into a case of environmental crime in the Netherlands in which law enforcement agencies refused to hand over information to the competent administrative body because they concluded from telephone intercepts that a representative of the province was leaking information to the director of the company under investigation. However, subsequent investigation did not render proof of corruption and in terms of efficiency, the decision not to share information was not a good one. Had the information been shared immediately, the administrative body would have been able to use it to close the entire facility; instead, almost four years later the criminal case is still pending in court and will probably result in only a relatively small financial penalty.

Apart from sharing information on individual persons or legal entities, law enforcement agencies may draw up general reports to inform administrative bodies and private parties of crime risks. In the Netherlands, for example, the police sometimes compile 'administrative reports' (*bestuurlijke rapportages*). Such a report may map a 'criminal business process' with the aim of raising awareness among partners of vulnerabilities so that they can take preventive measures. An example from the mid-1990s concerns a case in which a group of bank robbers used sledgehammers to break the protective glass between the bank employees and the customers. Banks used this information to install heavier glass that would not break if a perpetrator applied this method.<sup>7</sup>

<sup>6</sup> <http://www.nationalcrimeagency.gov.uk/publications/118-nca-news-january-2014/file>.

<sup>7</sup> Spapens 2002.

Finally, we must mention information exchange between the tax authorities and administrative bodies. The tax authorities may possess information that can be highly relevant for administrative bodies. The next section gives an example of how the Dutch tax authorities worked with local administrative authorities to close illegal casinos.

#### 13.3.4 *Combining competences creatively: the Joker project*

In the Joker project in the Netherlands, the tax authorities effectively combined their competence to collect debts with the competence of the mayor to close premises that violated local regulations on illegal casinos.<sup>8</sup> The project started in 1999 when about 75 illegal casinos were operational across the country. By 2005, the Joker project had led to the closure of all existing gambling houses. The intervention method was so successful that no new comparable casinos have appeared since then, and it was subsequently used to tackle illegal poker and bingo tournaments.

Illegal casinos in the Netherlands generally offered a type of observation roulette, for example 'Golden Ten' or varieties of this game. The customers could also play card games, for example poker or blackjack. In 2001, the estimated number of visits to illegal casinos was 1.5 million compared to 5 million visits to official casinos.<sup>9</sup> Although the illegal casinos were 'brick and mortar' gaming houses whose location was known to every local taxi driver, and also to the police of course, it proved difficult to close them down; even when closure was successful, a new casino would quickly appear, often in the same location. There were two reasons for their quick reappearance. First, these casinos claimed to offer games of skill, which did not require a licence, instead of games of chance, which did. Second, the Dutch Gambling Act stated that only publicly offered games of chance required a licence. Illegal casinos thus set themselves up as private clubs, although in reality every customer could become a 'member' on the spot. Proving that the casino was not a members-only club and offered games of chance was a time-consuming task for the police; for one thing, police experts had to observe the game on several occasions to establish whether it involved skill or chance.

Because the casino operators also committed tax offences – they were unable to pay gambling taxes voluntarily because doing so would be admitting that they offered games of chance, which was illegal without a licence – the tax authority could also reclaim some or all of the tax debt by seizing objects of value from the casino, such as the roulette and card tables. Logically, this had the same outcome as closing the casino down for violating gambling legislation. However, holding the 'club' liable for the remaining tax debt proved difficult, as the legal person was dissolved immediately and the 'board members' were

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8 This section is based on Spapens 2008b.

9 Regioplan 2001, p. 44.

penniless straw men. The real operators stayed behind the scenes and could easily establish a new 'club' to continue the gambling activities. It usually took several months before the police or the tax authorities were able to halt the operation. This period allowed the operators to make good on their investment and to gain substantial profits. Under these circumstances, it will hardly come as a surprise that the eagerness of the public prosecution service, the police, and the tax office to close the illegal gambling houses gradually waned. Moreover, the local authorities generally did not regard illegal casinos as a serious issue as long as there were no public order problems or visible criminal activities related to them. Hence, in many cases the authorities tolerated the situation. However, in 1996 the Ministry of Finance decided that massive tax evasion by illegal casinos needed to stop and launched a special project. After several years of preparation, the Joker project began in earnest in 1999.

As its most important feat, the Joker project found an effective method to prevent the illegal casinos from re-establishing themselves time and again, based on the administrative municipal by-law (*Algemene Plaatselijke Verordening*, APV). Among other things, local regulations specify the conditions under which the authorities will issue permits under the Alcohol and Catering Act. Such a licence is required for any place that serves food and drink, either alcoholic or non-alcoholic. This requirement also pertains to members-only clubs, even if they serve free food and drink. Illegal casinos were therefore unable to operate without such a licence. The APV also states the conditions under which the local authorities can revoke this permit. The Joker project asked the authorities of the towns with illegal casinos to add an extra paragraph to the by-law explicitly stating that any violation of the Gambling Act could result in administrative penalties, including closure of the premises and, ultimately, revocation of the licence. In the Netherlands, the administrative closure of premises, a decision taken by the mayor, is effective immediately.

The new paragraph added to the APV had a profound effect on the illegal casinos. As the burden of proof is less severe in an administrative case, a single observation and interviews with casino staff and players sufficed to close a casino down. It was no longer necessary to wait until the operators had built up a substantial tax debt. After the municipality amended its by-law, the existing casinos were closed. When a new one appeared, the Joker project team would immediately start coordinated inspections, often within a few days of the gambling house opening. During these visits, the tax authority's gambling experts established whether games of chance were offered and interviewed the players and personnel. Statements by the players were used to demonstrate that they made no effort to use skill in their games. The municipality checked whether the operators complied with safety and sanitary regulations. The police were present to protect the other civil servants and also checked for the presence of illegal arms and narcotic drugs. The public prosecutor was then able to hand over relevant information collected by one public body to another. Based on all the information, the Joker project team drew up a report that enabled the

mayor to close the casino. As a result, it was no longer profitable to open an illegal casino. By 2005, the authorities had closed all illegal casinos, and the situation has not changed since then. Most of the customers have moved on to gambling arcades and the internet. Criminals, who specifically wanted to avoid identity checks at the official casinos, have reverted to private homes and the concealed back rooms of shady bars.

### *13.3.5 Cooperating with private parties*

Apart from public bodies, private parties may also be able to help combat illegal activities and public order problems. Private parties may have relevant information and be able to take action on their own behalf. Although public-private partnerships were not the focus of this study, this section presents some examples of such cooperation.

#### **Denial of access to property**

To begin with, private parties can play a role in denying access to property that criminals use to facilitate illegal activities. An example from the Netherlands is cannabis cultivation in social housing. Non-profit private housing foundations or associations own the houses. If the police discover a cannabis nursery in social housing, the contract with the tenant allows the housing association to evict him or her from the property and to deny access to another of their houses for a certain period. This is justified by the fact that a cannabis plantation causes severe damage to the property, for example because of damp.

In Gothenburg, a property owner also terminated a lease when the tenant started to use a storage facility as a clubhouse for an outlaw motorcycle gang. It is of course essential that the provisions in such contracts should be clearly formulated to allow such measures; in addition, the private party must have a legitimate interest in taking action against his contract partner.

#### **Cooperating with private parties to reduce telecom fraud**

A specific example from Antwerp concerns 'phone shops', which allow customers to make overseas phone calls at reduced rates. The customers are usually poor immigrants. Phone shops are also vulnerable to criminal infiltration and known as locations for illegal activities, such as the trade in stolen smartphones. A specific problem in Antwerp was that phone shops regularly went bankrupt intentionally after only a few months, leaving the telecom operators with unpaid bills. The local authorities urged the telecom operators to be more restrictive in contracting shady phone shops. Combined with the requirement that such shops had to apply for a permit in order to prevent nuisance, this measure reduced the number of phone shops by 90 percent.

### Cooperating with private parties to reduce metal theft

The Pol-PRIMETT project is funded by the European Commission and offers an example of multi-agency cooperation involving public and private parties. The project is running in a number of EU Member States and aims to reduce metal theft. Pol-PRIMETT-1 ran from October 2010 to September 2013 and has been followed up by Pol-PRIMETT-2. The aims are to improve (transnational) collaboration between law enforcement agencies and the private sector in the fight against metal theft and to promote good practice across the EU, enabling the exchange of knowledge, skills and intelligence. The UK National Crime Agency heads Pol-PRIMETT-2, which involves partners from eight Member States. The project aims to disseminate information on offender profiles, crime locations, target materials, the stolen metal supply chain, prevention countermeasures, public-private security strategies, legislation and voluntary codes of practice.<sup>10</sup> The parties that cooperate in Pol-PRIMETT differ per Member State because each country is at a different stage of tackling metal theft and faces different challenges. Due to variations in legislation, culture, society and public/private structures, there can never be one solution to this problem.<sup>11</sup>

In the UK, for example, the police, the Crown Prosecution Service and the British Transport Police (BTP) are involved, but also the private, faith and heritage sectors. The latter are involved because theft of copper roofs causes severe damage to historical churches.

The BTP launched the Fusion Intelligence Unit in 2011, which brings together information from different government agencies, Crimestoppers and private parties such as railway companies and forwards it to the relevant police departments, such as the Regional Organised Crime Units (ROCU, see 4.3.2).<sup>12</sup> Another initiative was to have scrap metal dealers take photographic proof of the identity of anyone offering metal for sale (Operation Tornado). A final example are ‘days of action’ during which the police, the Environmental Protection Agency, the Vehicle and Operator Services Agency, the Department of Work and Pensions and the local authorities performed inspections of scrap metal dealers and set up road blocks to check the vehicles of persons wanting to sell metal.

## 13.4 WORKING APART TOGETHER IN PERMANENT/SEMI-PERMANENT STRUCTURES

### 13.4.1 Introduction

The examples of administrative approaches presented in Section 13.3 refer to case-based cooperation. Another option is to apply the concept in permanent or semi-permanent

<sup>10</sup> See: <http://pol-primett2.org/>.

<sup>11</sup> Pol-PRIMETT, *Findings of Pol-PRIMETT research activities*, via: <http://pol-primett2.org/>.

<sup>12</sup> Pol-PRIMETT, *Findings of Pol-PRIMETT research activities*, via: <http://pol-primett2.org/>.

bodies. Such bodies can focus on information exchange only, but they can also act as platforms to coordinate disruptive or repressive actions. The basic principle of an administrative approach in which agencies 'work apart together' but apply their own respective competences remains intact even if their seconded staff members share the same office.

The range of permanent and semi-permanent structures in place in the ten Member States varies greatly. They may include administrative bodies, customs, tax authorities and law enforcement agencies, or different combinations of partners. They may be territorially organized to address all serious and organized crime problems in a given place, but may also focus on a specific type of crime, such as VAT-related crime. Finally, some structures may be more or less permanent in nature, whereas others have been established for a set period. Below, we distinguish between structures at the national (Section 13.4.2), regional (Section 13.4.3) and local levels (Section 13.4.4).

### 13.4.2 *Integrated cooperation at the national level*

#### **Anti-mafia Directorate in Italy**

The Italian Anti-Mafia Investigations Directorate (Dia) was established in 1991 as an interagency investigative organization in which the State Police, the General Officers of the Carabinieri, the Corpo Forestale dello Stato, the Polizia Penitenziaria and the Guardia di Finanza cooperate to coordinate investigative activities as well as to carry out judicial police investigations into mafia-type criminal offences. The Dia comprises three departments tasked with preventive investigations, judicial investigations and international relations for investigative purposes, respectively.

The first type of investigation aims to gather information on criminal phenomena and the activities of persons who belong to mafia-type organizations. The intelligence gathered is used as a starting point for criminal investigations. This includes the composition of criminal groups, their domestic and international relations and their *modi operandi*. The emphasis is also on financial information, money laundering and public contracts. The latter topic is the responsibility of the Procurement Central Monitoring Authority (*L'Osservatorio Centrale sugli Appalti*, OCAp). The role of OCAp is to assist in preventing mafia-affiliated companies from obtaining public tenders. It cooperates with the multi-agency groups (*Gruppo Interforze*) set up with the Prefectures (see 13.2.4). The OCAp maintains a nationwide database of legal and natural persons involved in building contracts, for example.

The second department is tasked with criminal investigations. These investigations are intelligence-led and aimed at strategically selected targets. During such investigations, the Dia cooperates closely with the aforementioned police forces. Its main task is to coordinate and manage the operations.

The third department is responsible for international relations for investigative purposes. It promotes and builds cooperation with law enforcement agencies abroad in the field of organized crime. Such cooperation focuses on both the prevention and repression of organized crime.

### **The Unit Synthetic Drugs in the Netherlands (1997-2004)<sup>13</sup>**

In the second half of the 1990s, the Dutch authorities came under increasing pressure from abroad to tackle the problem of drug smuggling in general, and of ecstasy in particular. In 1995, the German police concluded that the Netherlands was the source of almost all of the ecstasy pills it had intercepted. The French authorities made similar observations and Senator Paul Masson even qualified the Netherlands as a *narco état*. The criticism worried Dutch Prime Minister Wim Kok, particularly because the Netherlands was scheduled to assume the presidency of the European Union in January 1997. Kok argued that failing to tackle ecstasy production would seriously damage the country's international reputation.<sup>14</sup>

In July 1996, the Dutch police produced an analysis report that made clear that the Netherlands had indeed developed into a major production country. Furthermore, it concluded that all sorts of government agencies bore some of the responsibility for the manufacture and trafficking of ecstasy, but had failed to share information and to cooperate effectively.<sup>15</sup> One of the main recommendations of the report was to establish a special unit in which different agencies worked together to address the ecstasy problem. In response to the Prime Minister's concerns, the Minister of Justice quickly adopted the idea and informed Parliament in September 1996 that this 'Unit Synthetic Drugs' (USD) would be set up as soon as possible.

The USD brought together personnel from the police, the public prosecution service, the Fiscal Intelligence and Investigation Service (FIOD), the Central Agency for Import and Export (CDIU), the Economic Investigation Service (ECD), Customs, and the Gendarmerie (Royal Netherlands Marechaussee). This enabled the integration of criminal and fiscal investigation, the monitoring of flows of non-controlled precursor chemicals required for the manufacture of synthetic drugs, and border controls.<sup>16</sup> The unit would comprise 46 personnel, operate for four years, and then be evaluated.

Its first task was to bring together information from different agencies for analysis and operational purposes, collect additional data in the Netherlands and abroad, and promote

<sup>13</sup> This section is based on Spapens 2013.

<sup>14</sup> Spapens 2006.

<sup>15</sup> IRT Zuid-Nederland 1996.

<sup>16</sup> The CDIU and ECD have since been merged with the FIOD. The Royal Netherlands Marechaussee is a military police organization, but it also performs a number of civilian tasks, such as policing the international airports.

information exchange. The fact that a third of the USD's staff was dedicated to this task underlines its importance.

Second, the USD would function as a national contact point for foreign authorities seeking information from the Netherlands, and it would also coordinate responses to requests for mutual legal assistance on synthetic drugs. Members of the USD also performed public relations tasks and travelled the world giving presentations on the Dutch approach to tackling ecstasy production and trafficking.

Third, the unit itself was to investigate criminal groups, usually in cooperation with regular serious and organized crime squads.<sup>17</sup> The USD established two investigation teams. The first focused on facilitators who traded in precursor chemicals and provided specific hardware to ecstasy producers. The second team performed 'quick interventions', usually short-term criminal investigations (six weeks), partly in response to requests for mutual legal assistance from abroad.

The Dutch authorities stepped up their efforts after the turn of the millennium. The main reason was fierce criticism by the United States regarding the rising number of pills from the Netherlands flowing into the country since the second half of the 1990s. President Bill Clinton personally lectured Prime Minister Kok during his visit to the White House in September 2000. Immediately upon his return, Kok angrily summoned the chiefs of police and the heads of the public prosecution service and demanded that they take bolder action against ecstasy production and trafficking. Furthermore, following its evaluation, the USD was allowed to continue for another four-year term.

The USD contributed to these efforts by providing information on the 'XTC network'. By combining information sources, the authorities had been able to identify the major producers and traffickers of ecstasy. The police chose the 'top ten' key players as the targets of large-scale criminal investigations which could take a year or more to complete. These operations employed the usual range of special investigative methods, such as wiretapping, surveillance, pseudo-purchase, and infiltration. Over a period of five years, different serious and organized crime squads were able to apprehend most of the key players. Prison sentences for the kingpins also rose from between six and eight years on average to twelve to fourteen years in several cases. There was also the risk of extradition to the United States in cases of trafficking ecstasy to that country, something that Dutch criminals particularly feared because of the conditions in American prisons.<sup>18</sup>

In search of integrated and innovative approaches, the USD itself focused on 'facilitators' providing key services to criminal groups manufacturing ecstasy. The USD succeeded in apprehending a person who adapted vessels originally designed as equipment for milking

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17 At that time, the Dutch police force was divided into 25 independent regions, each of which had a department for the investigation of organized crime. There were also six supra-regional organized crime investigation squads. The latter merged into the National Criminal Investigation Department in 2004.

18 Husken & Vuijst 2002.



cows into reaction vessels for synthesizing MDMA. The police had discovered the fruits of his labour in over twenty ecstasy laboratories. Criminal groups importing PMK from China were another important target of investigation. PMK is a controlled chemical and although other raw materials may also be used, the synthesizing process for PMK is much simpler. The arrest of several major importers in 2004-2006 resulted in a noticeable drop in production. In addition, another initiative proved to be essential for reducing the flow of PMK. The Dutch undertook successful diplomatic action to persuade the Chinese authorities to prevent chemical companies from covertly manufacturing PMK. This in particular resulted in PMK becoming a scarce product. The above illustrates that a combination of traditional investigation methods and integrated approaches toward facilitators may be powerful tools in the fight against organized crime.

### **Czech joint cooperation centre**

In the Czech Republic, cooperation and information exchange between law enforcement agencies, administrative authorities and private parties is common. One example is human trafficking, where the police cooperate with a non-government organization to help the victims (La Strada International). Another is the trade in counterfeit alcohol containing industrial alcohols such as methanol, which can cause health problems and even death. Here, a combination of criminal, fiscal (fines for tax evasion) and administrative measures (issuing of special stamps) was applied to address the problem.

Such cooperation was encouraged in the national *Strategy to fight organised crime for the years 2011-2014*. According to this strategy, 'cooperation between law enforcement authorities with administrative authorities is a key tool for detecting organised crime.'<sup>19</sup> The strategy promotes launching joint teams to detect and investigate economic crime, money laundering and laundering of the proceeds of crime (in collaboration with the Financial Analysis Unit and tax offices), smuggling and illegal production and trade (in collaboration with the Customs Administration and the Czech Trade Inspectorate), environmental damage (in collaboration with the Environmental Inspectorate), and possibly in other areas.<sup>20</sup> It also aims to enhance cooperation between the police and the tax authorities (including a joint team to detect tax crimes) and the intelligence services, respectively.

Czech legislation already allows for this type of cooperation, but the government considered it a problem that it was ad hoc and incident-driven and depended on individual staff to establish contacts with other public or private partners.<sup>21</sup> The aim of the strategy is therefore to achieve more systemic cooperation between different government agencies.

<sup>19</sup> Ministry of the Interior 2011.

<sup>20</sup> Ministry of the Interior 2011, p. 37.

<sup>21</sup> Interview, Czech Ministry of the Interior, 31 March 2014.

In March 2014, the Ministry of the Interior was in the process of establishing a joint centre at the national level in which the police, the Customs Administration and the tax authorities would cooperate. The centre will be responsible for investigating organized crime and comprise about 60 staff, who will be able to access the databases of their respective agencies and exchange information directly. Furthermore, local and regional agencies may contact the centre if they require information from or contacts within one of its partner organizations.

### **VAT Task Force in Poland**

At the national level, Poland has established several integrated task forces to counteract specific crime problems. Examples are VAT-related crimes, metal theft (in the context of the Pol-PRIMETT project, see 3.5.2) and the trade in new psychoactive substances. A Task Force was also launched for asset recovery.

On 30 January 2014, the Minister of Internal Affairs, the Minister of Finance and the Prosecutor General concluded the *Agreement on cooperation in developing systemic solutions aimed at preventing and combating economic crime*. Based upon this agreement, two working groups were established.

The first working group, led by the Ministry of Internal Affairs has been tasked to develop proposals for instruments for the efficient recovery, accounting and management of secured property derived from crime. This working group prepared so far:

- a concept of inter-institutional trainings in financial investigations;
- a draft Law on the Central Data Base for accounts – aimed as a tool for fast acquisition of complete and reliable information about accounts and other investment products enabling storage of financial assets;
- still ongoing is the elaboration of a methodology for the management of secured property derived from crime.

The second working group, led by the Ministry of Finance, was tasked to deal with VAT and excise fraud. This working group deploys activities in three areas:

- development of joint legislative and organizational initiatives aimed at improving the inter-institutional activities in preventing and combating VAT and excise fraud. This included, *inter alia*, a survey among law enforcement officers to identify the main problems in counteracting VAT and excise fraud. Based on the survey results, proposals for concrete solutions, contributing to systemic changes, will be prepared;
- inter-institutional cooperation in training. This concerned joint training on counteracting VAT and excise fraud for the police, the fiscal control authorities and prosecutors. This training was offered to all the Appellate Prosecutor's Offices in Poland.
- implementation of integrated pilot actions to counteract the most important areas of economic crime. Implemented measures for example concerned irregularities in the

turnover of fuel and electronic products. The working group initiated and implemented joint inter-agency operations aimed at counteracting such irregularities.

The latest systemic result of the agreement is the elaboration of a draft *Programme for preventing and combating economic crime, for the years 2015-2020*, which aims at identifying and coordinating the implementation of a national policy to strengthen the mechanisms for preventing and combating economic crime. The main objective of this programme is to reduce economic crime by strengthening the system for preventing economic crime, increasing the effectiveness of the combat against economic crime and enhancing the efficiency of with which proceeds of crime are recovered. The programme will be give the status of a governmental programme. Currently, the legislative process is ongoing and will be finalized when the Council of Ministers of the Republic of Poland has adopted the programme.

Already in 2011, the Ministry of the Interior and the Ministry of Health developed a coordinated response to new psychoactive substances (NPS). These substances are not included in the legislation on illicit drugs but can be dangerous to a person's health. Furthermore, to circumvent regulations on food and drug quality, shops sold these substances as 'collector's items' that were not to be consumed or otherwise used by the buyers. The Polish authorities adopted legislation enabling the chief sanitary inspector and the regional offices to halt the sale of these substances by administrative decision temporarily so as to determine whether they are harmful to health and so as to secure all stocks of the drugs. In addition, different authorities carried out site inspections to establish whether the shops involved complied with all sorts of regulations, closing the ones that did not comply. Sales of NPS dropped off considerably as a result.

#### 13.4.3 *Integrated cooperation at the regional level*

##### **Regional Intelligence Centres in Sweden**

In the mid-2000s, Sweden saw a rising number of violent crimes committed by members of organized crime groups and outlaw motorcycle gangs. In November 2007, for example, there was a bomb attack on the house of a public prosecutor in Trollhättan. At the time of the attack, she was preparing a trial concerning a criminal group.<sup>22</sup> In response, Minister of Justice Beatrice Ask initiated a programme to combat organized crime. One of its outcomes was a national operative council for the police and three Regional Intelligence Centres (RICs). The police also intend to establish regional task forces specifically to combat organized crime that will employ 200 staff in total.

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22 Korsell, Skinnari & Vesterhav 2011.

The RICs facilitate information-sharing between the police, customs (*Tullverket*), the Swedish Economic Crime Authority (*Ekobrottsmyndigheten*), bailiffs (*Åklagarmyndigheten*), the Crime Units of the Swedish Tax Authority (*Skatteverket*) and other agencies. A Steering Group decides at the strategic level which projects the RICs should work on. At the operational level, the Operative Council meets every four weeks to discuss specific cases and phenomena that require interventions. If a partner organization is of the opinion that a particular criminal group or phenomenon should be tackled, it presents its case before the Council. In early 2014, there were 46 key criminals under investigation.

There are currently three RICs (in Stockholm, Gothenburg and Malmö), but the intention is to open another five in order to cover all of Sweden. An RIC can be visualized as an office where intelligence staff from the various partner organizations can access their respective information systems and integrate their findings. The RICs cooperate closely with the task forces and provide these with information and intelligence relevant for their investigation. Cases are discussed in informal, usually weekly meetings. Depending on the nature and scope of the case, and the state of the investigation, all or some of the agencies participate. One operation may lead to a number of different court cases, with different public prosecutors, because the intention is not just to apprehend perpetrators but also to remove the infrastructure they use to commit crimes and launder money, for example. The importance of the RICs and the task forces is that the partner organizations now have immediate access to relevant information, whereas before they usually received it only as a leftover when the other agency had completed its investigation. “The difference with some years ago is that we look at a problem in a different way. We not only look at the crime or the suspect, but also at his businesses, his property, his finances and so on, and ask ourselves what we can do together” explained a police officer whom we interviewed. The cases addressed by the task forces are the most serious organized crime cases involving violent criminal groups that have infiltrated in legitimate businesses and are attempting to exert unlawful influence on civil servants. The local police handle ‘normal’ cases of narcotic drug dealing, for example.

### **GAIN network in England and Wales**

The Government Agencies Intelligence Network (GAIN) in England and Wales is a multi-agency group that brings together intelligence and investigation staff from public sector enforcement agencies to lawfully share information and intelligence. The exchange of information may of course also prelude joint investigations or other coordinated interventions.

GAIN was established at the end of 2013 and is specifically aimed at reducing the threat, harm and risk associated with serious and organized crime. The origin of GAIN lies with the Regional Organised Crime Units (ROCU), of which there are currently nine in England

and Wales. The ROCUs provide capability to investigate serious and organized crime across police force boundaries.<sup>23</sup>

Each ROCU has a GAIN coordinator at both a strategic and tactical level who acts as a gateway through which the different partners can share information. At the regional level, the partner organizations generally meet once every three months to discuss ongoing and emerging issues and cases. The aim of these meetings is to decide on actions and resources. A Deputy Chief Constable chairs a meeting of the GAIN Executive group at the national level, facilitating the implementation of the GAIN programme. GAIN is supported by the Home Office.

Twenty different government bodies were participating in the network in May 2014, including the police, HM Revenue and Customs, the National Health Service – Protect, Trading Standards, the Gambling Commission, the Driver & Vehicle Standards Agency, and the Environment Agency. The legal basis for information-sharing is regional agreements. This document allows for full sharing of information and intelligence between the different partners, although individual agencies can ‘opt out’ with regard to specific types of information.

Information between the partner organizations is shared through a secure online system comparable to an e-mail network. It uses a standard form for posing a request for information and data-sharing. If a colleague requests information, a GAIN authorized employee fills in the form, signs it, and forwards it to the regional GAIN coordinator. From there, the form is distributed to all the other partners, or a selection depending on the wishes of the requesting agency. The partners establish whether they have relevant information and report this as either a ‘hit’ or a ‘no-hit.’ The requesting party is informed about both outcomes. The system itself therefore does not store intelligence. In the event of a hit, further information is exchanged bilaterally. The outcome may also be that two or more partner organizations continue working on the case together, and approaching it from all possible angles.

### **Regional Intervention Groups (France)**

The French Regional Intervention Groups (RIG) were set up in 2002 and have grown to 37 RIGs throughout the country. Their primary task is to identify and seize illegal assets. The RIGs employ six to 25 staff who represent the National Police, the Gendarmerie, the Tax Authorities and Customs.

The RIGs act on indications that a person’s assets are potentially illicit or in cases when a person has an unusually luxurious lifestyle and wealth. In such cases, the RIG may perform a financial analysis to establish whether a person’s legitimate income is consistent with his or her lifestyle. This is evaluated based on data available to each of the partner organizations

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23 HM Government 2013.

in the RIG. Tips about suspicious financial behaviour come from various public services, databases such as the unusual and suspicious transactions database (TRACFIN, *Traitement du Renseignement et Action Contre Les Circuits Financiers Clandestins*) and the intelligence services. From 2009 to 2013, the RIGs seized approximately €443 million, confiscating €138 million in 2013 alone.

### **Regional Information and Expertise Centres in the Netherlands**

In 2008, the Dutch Ministry of the Interior launched the Administrative Approach to Organized Crime programme. The main aim of this programme was to improve implementation of the instruments available to disrupt criminal activities and promote their coordinated application. One outcome of this policy was the establishment of ten Regional Information and Expertise Centres (RIECs).<sup>24</sup> The RIECs were greatly inspired by the Emergo project discussed below, and operate as platforms for the exchange of information between municipalities, provinces, the public prosecution service, the tax authorities, the special investigative services and other public and semi-public bodies.

The RIECs became operational in 2010 and were given two main tasks. The first is to facilitate information exchange. The main aim here is to bring together information held by the different partners, either to detect criminal activities in the geographical area for which the RIEC is competent or to decide on interventions to disrupt these activities. Analysts from different disciplines working at the RIEC bring together the available information in a report and advise on which instruments may be used to tackle the problem.

The second task of the RIECs is to facilitate interventions aimed at disrupting criminal activities. Depending on the nature of the illegal activities, one partner can be asked to intervene. In complex situations, effective disruption may require a coordinated effort involving two or more partners and hence ongoing information exchange and fine-tuning. Depending on the nature of the activities, interventions may be based on criminal law, administrative law, fiscal law or combinations of these instruments. To this end, illegal activities are often analysed in terms of 'criminal business processes.' First, the chain of logistics is determined. Based on this, the RIEC establishes which partner is best able to intervene in a particular part of the business process. This analysis tool is known as the 'barrier model'. Such models have been drawn up for assorted types of crime, for example human trafficking, illegal immigration, cannabis cultivation, synthetic drugs production and specific environmental crimes.

The following example briefly describes how one of the RIECs proceeded to tackle a network of individuals involved in cannabis cultivation in one of the major cities in the south of the Netherlands. Its approach focused specifically on persons who facilitated this

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24 There is also the LIEC (*Landelijk Informatie- en Expertisecentrum*), which operates at the national level. The LIEC is policy-oriented and facilitates the RIECs but it does not handle operational cases.

criminal activity, such as real property agents who provided houses and commercial property for cannabis nurseries to criminal groups, electricians who installed the wiring in the plantations, rental companies that provided cars and vans for the transport of growing equipment, cannabis and waste from the plantations, and lawyers who advised the criminals on how to launder money.

The starting point for this particular operation was a witness who had played an important role in a criminal group and who knew most of the others in the local network of large-scale cultivators. He decided to quit when other key members in his group started to threaten him.<sup>25</sup> One day in 2012, he walked into a police station and began to give detailed statements on the functioning and composition of the local cannabis network. This allowed the police to take action against several suspects and mount extensive searches of their houses, where they found 1.4 million euros in cash buried in plastic containers in the gardens, for instance. Next, the information from the witness's statements was passed on to the RIEC. Here, the aim was to disrupt the infrastructure of the network, both the legal and the illegal parts of it.

The RIEC first identified and listed all individuals and locations mentioned by the witness. It next installed a situation room for representatives of the police, the public prosecution service, the tax authority and the municipality. In this room, nicknamed the 'pressure cooker', they had direct access to their own information databases. They were tasked to discuss all possible interventions against the identified subjects from a criminal, fiscal and administrative law perspective and come up with recommendations and plans. Depending on the subject, the recommended intervention might involve a single agency or require a coordinated approach. Next, the interventions were rated in terms of effects, efficiency and their contribution to the disruption of the local cannabis network. Based on the list of priorities, six subjects were selected for integrated repressive interventions. The interventions were not necessarily aimed at key persons within criminal groups, but at individuals who worked for different groups and were thus more crucial to the network as such. These included electricians, who had the expertise to install the wiring in large plantations in a way that reduced the risk of detection by the power company, for example by means of a setup that prevented suspicious peaks in electricity use. Although such experts performed crucial roles, they were usually not hardened criminals and this increased the chance that they would provide further information and evidence.

In addition, the RIEC initiated general preventive activities. For example, it became clear that criminal groups carefully prepared covers for persons who posed as tenants of

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25 Of course, the witness could have been treated as a criminal informer, which would have meant keeping his identity secret. However, the information he provided was so specific that the authorities would then have been unable to use it without disclosing the source to his fellow criminals. Hence, the police asked him to deliver the statements as a normal witness, to which he agreed. He and his family have been taken into a witness protection programme.

private or commercial property in which they installed cannabis plantations. ‘You do not send a youngster in a tracksuit to rent a villa in an affluent neighbourhood, but a well-groomed man in his fifties with a credible financial background,’ explained the witness. This of course is rather obvious, but he also gave other details that were used to inform bona fide real property agents and thus enable them to detect whether a prospective tenant was actually a front for a criminal group.

The ‘pressure cooker’ method differs from the usual approach in the sense that all relevant partners exchange information and intelligence and discuss interventions from the beginning. In most other cases, one party starts to address the problem on its own and is inclined to involve other partners only after they have successfully completed their own activities or, conversely, run into problems.

Of course, this type of multi-agency cooperation is not without its problems and frictions. Although the exchange of information and intelligence in the context of the RIECs is based on a specific legal framework agreement, there will always be self-declared ‘experts’ on data protection laws within the various agencies who will contest whether particular information can be shared legally in specific situations. Most notably, the police and the public prosecution service have a culture of secrecy, even within their own organizations, and many of their personnel tend to be uncomfortable with the idea of opening up to ‘outsiders’. Another problem, mentioned below in the context of the Emergo project, is that the different agencies participate voluntarily in the RIEC. That means that none of the partners can overrule the other. When conflicts arise at the operational or middle management levels, a ‘steering group’ consisting of the regional heads of the relevant agencies must convene and find a solution, which causes delays. Not surprisingly, effective multi-agency cooperation often requires substantial diplomatic skills.

#### 13.4.4 *Integrated cooperation at the local level*

##### **Emergo project in Amsterdam (The Netherlands)**

In 2007, Amsterdam launched the Emergo project as a multi-agency approach to serious and organized crime (e.g. exploitation, narcotic drugs, money laundering) in the Red Light District.<sup>26</sup> In Emergo, the police, the public prosecution service, local government, and the tax authorities worked together, with academics also joining the team. The project involved both information analysis and an operational part. The Emergo project did not have investigative personnel attached directly to it, and the members of the team did not work together in a single office but they did meet very frequently.

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26 Projectgroep Emergo 2011.



The Emergo project broke down into two main parts. The first was operational and consisted of two groups: the Enforcement Group, which was concerned with surveillance and control, and the Serious Crime Group, which was tasked with criminal investigation.<sup>27</sup> The joint objective for both groups was to intervene where possible in crime-related problems. Staff in the groups overlapped to some extent. The Enforcement Group consisted of civil servants from the Central Borough of the City of Amsterdam tasked with licensing, Tax Administration staff tasked with controlling the businesses in the district, and uniformed police officers working on the streets. The Serious Crime Group comprised personnel from the Central Borough but also from the Van Traa team. Police representatives were from the Serious and Organized Crime Department of the Amsterdam-Amstelland police region and from the Tax and Customs Administration's Serious Cases Team. The latter handles fiscal cases involving key members of organized criminal groups.

Information-gathering and analysis constituted the second part of the Emergo project. Here, the primary goal was to identify hidden crime problems in the district by bringing together information from the databases of the Emergo partners and from open sources such as the Chamber of Commerce register. The exchange and use of information required the development of a specific legal framework agreement, which the Emergo partners signed in 2008.

The information and analysis part of Emergo also consisted of two subprojects. The first involved human analysts from the police, local government and the tax authorities, who collected and compared information in five separate projects. These concerned a thorough analysis of two particular streets in the Red Light District, a selection of one-star and two-star hotels, a selection of *coffeeshops* situated in the district, a selection of key players and facilitators known to the Emergo partners, and a study of the problem of human trafficking in the district. In all these projects, the analysts collected and evaluated every piece of information available on persons, businesses and premises. They then passed on indications of crime, fiscal irregularities or non-compliance with administrative regulations to the operational groups and documented these in analysis reports.

The analysis of one street, for example, revealed that about 30 percent of the addresses had no registered inhabitants. The Enforcement Group thus set up an operation to check these premises. It became clear that all sorts of persons lived there who preferred not to make their presence known to the authorities, such as Eastern European prostitutes and pimps. Several houses also turned out to be in use as an illegal hotel. These findings were followed up by administrative and fiscal measures, for instance because the operators of such hotels had usually 'forgotten' to report their income to the Tax Administration. The hotel project led to the identification of a hotel owner known to the police for possible involvement in drugs trafficking, whereas the tax authorities had serious questions about

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27 Projectgroep Emergo 2011, p. 284.

the financing and operation of the hotel. Based on these findings, the Serious Crime Group initiated an investigation, which was successfully completed. These are just a few examples.

Generally speaking, creating an open atmosphere in information exchange contributed greatly to building trust among the partners. Before, secrecy fed the idea that the other party was sitting on a mountain of data that it was unwilling to share. It soon became clear that the opposite was true. One interesting but not unexpected discovery was that the available information on particular persons or problems usually pointed in the same direction. Whenever the police had its doubts about a person or a business, the tax authorities and local government also had information on irregularities, and vice versa.

Although manual analysis of various databases produced a great deal of useful information to which the different partners could respond, it also proved to be time-consuming. Even though the Red Light District comprises no more than a few square kilometres, it was impossible to have analysts screen it manually. A second subproject was therefore launched aimed at developing data mining techniques to identify persons, legal entities, and premises with non-standard profiles. Human analysts could then further analyse the 'red flags'. This subproject ran into many difficulties, however. To begin with, it took considerable effort to obtain databases from the different partners and to format them for analysis purposes. Merging of databases proved to be problematic because the police, the city, and the tax authorities had registered the same person under a slightly different name, for instance if the name concerned was Arabic, Chinese or Spanish. It took a team of ICT specialists and academics almost three years to come up with the first results. One was the identification of a group of persons whose profiles were similar to those of known serious criminals. Of course, establishing whether these individuals were indeed engaged in organized crime would require further manual analysis. Unfortunately, this proved to be impossible because a municipal data protection committee, tasked with supervising the use of the population register database, decided that the results could not be shared with the operational pillar of the Emergo project. This revealed a flaw in the legal framework underlying the project: although the Ministries of Justice, the Interior, and Finance, as well as the Emergo partners had all signed the framework agreement, that agreement did not override the decisions of privacy committees operating at lower levels.

Beyond this, however, Emergo profoundly changed operational cooperation in actual criminal investigations. In earlier cases of human trafficking, the police performed their investigation independently and focused only on the pimps who actually exploited women. Afterwards, the police advised local and fiscal authorities on specific measures in an 'administrative report'. The reports only addressed general issues, however, and offered the other government agencies little news. Of course, the public prosecution service also transferred information from police files to the local authorities, but because the police were not experts on administrative law, the files often lacked the precise information local authorities needed to take action.

In the Emergo project, the targets were not only the pimps who were actually exploiting women but also the companies renting out the windows, the owners of the premises, and the facilitators. In other words: the purpose of the investigation was not just to prove human trafficking but also to gather the precise details required for administrative and fiscal proceedings. During the first investigation, the team of detectives, Central Borough staff, the Van Traa team, and tax administrators met every month to discuss results and tactics.<sup>28</sup> On the one hand, the meetings allowed the partners to make clear which information they needed; on the other, the local authorities and the Tax and Customs Administration could act immediately on specific information. For instance, when the police found out where the prostitutes and pimps stayed, it shared this information with local government. The local authorities then traced who had rented these houses or apartments in order to assess compliance with local regulations.<sup>29</sup>

The criminal investigation and the administrative proceedings were also intertwined in other ways. For example, during the investigation the operator of the company that rented the pimps the windows transferred ownership to his brother. However, the local authorities issue licences to a person and not to a company. The new owner should therefore have applied for a licence, which he ‘forgot to do’. Consequently, the company was ordered to stop renting windows to prostitutes. The investigation team and local government staff carefully orchestrated delivery of this notice, allowing the police to use wiretapping and surveillance to observe which persons the ‘owner’ – who was suspected of being a mere front – would contact in response.<sup>30</sup> This is but one example of how the Emergo partners aligned interventions and tactics to tackle the whole of the infrastructure used in the exploitation of women.

The Emergo project made clear that professionals from different government agencies usually have little trouble cooperating closely. However, three important problems remain. The first is information-sharing. Dutch legislation on data protection is very complex, and although legal advisers from the Ministry of Justice had reviewed the Emergo framework agreement in detail, there were always other ‘specialists’, particularly within the police, who had their own opinions and sometimes succeeded in convincing managers that certain types of information could not be shared.

The second problem is a shortage of available personnel for conducting investigations, especially in the police force and, to a lesser extent, the Tax and Customs Administration. The Dutch police force is notoriously understaffed when it comes to planned investigations,

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28 Verhoeven, Van Gestel & Jong 2011.

29 The housing shortage is a significant problem in Amsterdam, but rents are kept low for tenants of premises owned by the city or a housing association. Some of those tenants then sublet their house or apartment – including to criminals – at market rates, which is of course not allowed.

30 Verhoeven, Van Gestel & Jong 2011.

and the teams that decide which cases should be pursued regularly refused to commit resources to Emergo investigations.

The third problem is that in a cooperative effort such as Emergo, no single partner is leading. When specific problems arose, for instance regarding data protection and resources, no one had the power to take a final decision. This regularly called for 'massaging' and persuasion.

### **Centre of Knowledge against Organized Crime in Gothenburg (Sweden)**

In Gothenburg, the Centre of Knowledge against Organized Crime fights gang crime, organized crime and unlawful influence. Its mission is to sponsor, support and lead networking activities and projects aimed at concrete measures. The Centre was launched in June 2008 specifically to tackle serious problems with organized crime in the city. In 2006, a car owned by a doorman at a nightclub was blown up in the city centre. There was also a spectacular robbery at the Post Office, with seven burning cars in the city centre.<sup>31</sup> During this period, shootings and other violent crimes also became an increasing problem that persists to this day; in 2013, there were 58 shooting incidents involving eight deaths.

The Centre works as a coordinator and supports municipal and state agencies as well as private parties in Gothenburg. It is part of the City Council of Gothenburg and works with eleven government agencies: the County Administrative Board, the Tax Agency, the County Police, the public prosecution service, the Economic Crime Authority, the Security Service, the Enforcement Authority, the Prison and Probation Service, the Social Insurance Agency, the Employment Agency and Customs. The regional heads of these agencies participate in a steering group that discusses strategic policies and priorities. At the operational level, the contact group meets six to eight times per year. Apart from this, there is also close cooperation with private parties, such as real property owners, non-profit organizations and businesses.

The Centre itself is a small unit of six persons, including civil servants and one police officer. On the strategic level, it aims to implement long-term structural measures that disrupt the preconditions for organized crime and unlawful influence. To this purpose, the Centre collects and distributes information, supports learning and participates in debates on legislation, urban planning, procurement, the social insurance system and licensing. An example from 2010 is how it contacted politicians and the Justice Department in Stockholm to inform them of problems with legislation regarding the unlawful possession of firearms. At the operational level the Centre initiates, supports and leads networking activities and projects aimed at concrete measures against gang criminality, organized crime and unlawful influence. The Centre also offers advice and supports local organizations and citizens.

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31 Korsell, Skinnari & Vesterhav 2011, p. 34.

The Centre of Knowledge has four main areas of activity. The first is employment, where it aims to prevent unlawful influence by supporting and assisting officials in carrying out their tasks. The second is the economy, where it works to prevent organized criminals from accessing procurement procedures, financial assistance, licensing and premises. Third, the Centre supports both the victims of organized criminal activity, for instance those who have been threatened or extorted, and perpetrators who want to give up their criminal activities. The fourth main area of interest is to guarantee the integrity of democratic institutions. This includes preventing criminals from exercising unlawful influence over politicians, civil servants and journalists.

The Centre of Knowledge facilitates cooperation between the partner organizations, for example by promoting the establishment of operational teams that can address long-term and ad-hoc problems. Much of the work of the Centre is based on informal networking, bringing together people from different agencies and building trust between them. The Centre is also involved in screening applicants in the context of procurement and licensing, and it has access to police intelligence. Sweden does not have legislation on sharing law enforcement information with municipalities, but there is a general clause (Art. 14) in the Secrecy Act that allows this when the public interest prevails over the interest of the individual. Invoking this provision, however, is a continuous balancing act.

One of the concerns in Gothenburg are the clubhouses of outlaw motorcycle gangs. These are used to recruit new members, strengthen the networks and help to create a feeling of 'us against society'. They stir up feelings of unsafety in the community. Preventing the gangs from acquiring clubhouses is an ongoing concern. In one case, an outlaw motorcycle gang the Red Devils MC had subleased property from a tenant who had supposedly rented it as Mandroms MC as a regular motorcycle club. With the help of the City, the property owner initiated a civil case to terminate the contract because the subleasing had been unlawful. The outlaw motorcycle gang did not wait for the outcome of the case, but moved voluntarily. They next bought an old ship lying in Gothenburg harbour with the aim of converting it into a new clubhouse. However, they forgot that the City owns the port. Moreover, the ship could only remain moored there permanently if the owners joined the *Fartygsföreningen Gullbergskajen*, an association for ship restoration. With the help of the City, the association succeeded in refusing the Red Devils MC as members and in the end, they gave up and sold the ship. This example underlines that all sorts of unexpected regulations may be applied in the context of an administrative approach.

Recently, the efforts of the Centre of Knowledge have resulted in criminals moving to other parts of the Gothenburg agglomeration to acquire property. These communities have less experience with organized crime and administrative prevention. The Centre has therefore started to advise the local authorities in the suburbs, and there is also discussion about expanding its activities to 12 villages around Gothenburg. This will require extra offices and personnel, however.

### **‘Administrative approach to organized crime’ project in Genk (Belgium)**

Genk is a Belgian city located in the Meuse-Rhine Euroregion. This particular region is one of the most densely populated border regions in the EU and faces various types of serious and organized cross-border crime.<sup>32</sup> One example is the emergence of ‘integrated crime groups’ that operate parts of their criminal business processes, such as synthetic drugs production and cannabis cultivation, across the entire border area. For instance in ecstasy production, chemicals may be stored in Germany, the laboratory where MDMA is synthesized may be located in Belgium, and the final product, the pills, may be manufactured in the Netherlands. The members of such groups may also live in different countries in the region.<sup>33</sup> Not surprisingly, they may also try to infiltrate the legitimate economy throughout the border area.

When the Dutch part of the region introduced an administrative approach to organized crime in 2005, modelled after the Van Traa team in Amsterdam, the authorities immediately foresaw the risk of a waterbed effect to other parts of the region, particularly from the Netherlands to Belgium. In 2010, a comparative study was published on administrative measures to prevent and repress crime and to cooperate across borders.<sup>34</sup> In 2013, the city of Genk set up a two-year pilot project entitled ‘Administrative approach to organized crime’ which was funded by the European Commission. The project was specifically meant as an experiment with an administrative approach in Belgium and to explore the option of cross-border cooperation with the Netherlands in this field.

The Genk project adopted the structure of the Dutch RIEC located in Maastricht.<sup>35</sup> The project is run by a steering group involving the City of Genk, the Belgian Province of Limburg, the district public prosecution service in Tongeren<sup>36</sup>, the local and federal police, the Ministry of the Interior, and the Association of Belgian Cities and Municipalities (*Vereniging van Vlaamse Steden en Gemeenten*).

At the operational level, the local consultative group discusses the cases. The group consists of representatives of the City of Genk, the local police and public prosecution service, inspectors from the Federal Public Social Security Service (*FOD Sociale Zekerheid*) and the Federal Public Economic Service, (*FOD Economie*) as well as representatives of the Public Centres for Social Welfare (*Openbare Centra voor Maatschappelijk Welzijn*). Of course, staff from the various municipal service departments also attend meetings if the cases require this. The Tax Authorities have also been invited to join the group, but as

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32 Spapens & Fijnaut 2005.

33 Spapens 2006.

34 Van Daele et al. 2010.

35 Although their purpose is the same, the Dutch RIECs may differ slightly in organizational structure.

36 The district of Tongeren has since merged with the district of Hasselt and now constitutes the district of Limburg.

explained above, the possibility of information-sharing between the tax service and other public bodies is limited, although the VAT control group cooperates as an observer.

The project decided to focus on *nightshops* and human trafficking as targets for coordinated interventions. With regard to the *nightshops*, the project initiated joint inspections to check whether these shops complied with business regulations and specific local rules. The inspections revealed all sorts of shortcomings; for example, some of the persons employed at the shops also received unemployment benefits, and quite a number of these businesses had not been properly registered with the Chamber of Commerce. In the latter cases, the Federal Public Economic Service followed up on these infringements.

Inspections of houses that served as temporary residences for migrant workers led to indications of human trafficking. In one case, the building inspector for the City of Genk conducted a quality inspection of a house after receiving information that the owner was renting it to illegal migrant workers. He discovered 17 Bulgarians and Romanians, including some children, living there and sleeping on mattresses on the floor. The property owner tried to intimidate the inspector when he announced that he would be taking further steps. Consequently, the local consultative group discussed the case and decided to gather more information. As it transpired, the owner possessed other houses as well and already had a record of violating the building codes. He also operated a grocery that caused parking and waste disposal problems in the surrounding neighbourhood. In addition, the annual turnover of this shop was largely cash-based and much higher than one would expect. Based on the information collected, the authorities assumed that the property owner acquired most of his income by renting temporary housing to foreigners at exorbitant prices and laundered the money through his grocery. The property owner was already the subject of a court case for building code violations.

These experiments revealed two main problems. The first was the absence of local regulations pertaining to *nightshops*. For example, there was no by-law to regulate the number of shops and their locations in order to prevent their concentration in one area. Furthermore, the City of Genk could not screen the operators because there were no requirements concerning criminal background or good conduct. As a result, the City initiated the adoption of additional local regulations.

Second, it proved difficult for the police and the tax authorities to share information directly with the administrative authorities. The City of Genk, for example, could hand over all its relevant information to the law enforcement agencies and the tax authorities, but it took a very long time before they made their intelligence available to their administrative partners. The lack of criminal and fiscal information is particularly problematic. Only after a person has been convicted does the information become available to the administrative authorities. This is not always satisfactory, however, because the administrative authorities might have been able to act at an earlier stage if they had received the relevant information. The Genk project sparked off a discussion with the police and the

public prosecution service as to when the public interest, for example to prevent straw men from obtaining a licence, should prevail over the efforts of law enforcement agencies to obtain a conviction and in which cases both objectives could be reached.

### 13.5 CONCLUSION

We began Part I by presenting the following working definition of an administrative approach: *'preventing the facilitation of illegal activities by denying criminals the use of the legal administrative infrastructure.'* Part III has shown that this definition is too narrow because the selected Member States also apply an administrative approach to actively disrupt and repress serious and organized crime. One crucial aspect is 'working apart together', in which different government bodies exchange information and develop concerted responses to crime and public order problems. 'Apart' refers to the fact that every agency uses its own competence. The added value of the approach is coordination on the one hand and the more effective use of the information available with different partners on the other.

Given the practical experiences described here, the definition should be amended as follows: *'preventing the facilitation of illegal activities by denying criminals the use of the legal administrative infrastructure as well as applying coordinated actions to disrupt and repress serious and organized crime and public order problems.'*

In practice, the options available to *prevent* criminals infiltrating legitimate business activities are often limited, as most business regulations only require the absence of a relevant criminal record. Of course, background checks are more extensive when the economic activity is considered crucial to a nation's economy, such as banking, or when it presents a greater risk to the safety of consumers or the environment, such as operating a gambling venue or selling firearms. However, only Italy and the Netherlands have adopted legislation specifically designed to protect activities considered vulnerable to misuse by organized criminals.

Administrative authorities may base *repressive* action taken against illegal activities, or the disturbance of public order, on a wide range of regulations, such as business regulations and local rules to guarantee public order. Applicable regulations are in place in all of the Member States studied here. These allow for inspections and sanctions, which the competent administrative authorities can execute independently. Administrative authorities may also use information from law enforcement agencies and the tax authorities. However, the exchange of such information outside the scope of a criminal investigation or before a person (or legal entity) has been convicted is less far developed in most countries. In England & Wales and Sweden, a variety of agencies can share information at the regional level in the GAIN network and the Regional Intelligence Centres respectively, but the local



administrative authorities are not included in these structures. In the Netherlands, Sweden and Belgium, the local administrative authorities are included in the Regional Intelligence and Expertise Centres, the local Centres of Knowledge Against Organized Crime in Gothenburg, Malmö and Stockholm, and the Administrative Approach to Organized Crime project in Genk, respectively. In Italy, the *Direzione Antimafia* can share information with the prefects with regard to anti-mafia legislation. If information cannot be shared officially, law enforcement agencies and the tax authorities may still be able to exchange information with administrative bodies informally. Although administrative bodies cannot use that information directly to impose sanctions or revoke licences, the knowledge that something is wrong sends up a red flag. In addition, informal information exchange may still enable different public bodies to 'work apart together'. In that case, the intelligence is used to agree on coordinated actions, such as joint inspections, but in executing such actions, every agency acts in accordance with its own competences. Such cooperation may be initiated ad hoc in all of the Member States studied here, for particular problems that are regarded as considered serious.

Taking the idea of 'working apart together' a step further involves installing permanent or semi-permanent structures in which different agencies exchange information and develop coordinated actions. Such structures may be organized at the national, regional or local levels. They may be problem-oriented, such as the Unit Synthetic Drugs in the Netherlands or the VAT Task Force in Poland, or territorially oriented, such as the projects in Amsterdam (Emergo), Gothenburg and Genk, the Regional Organised Crime Units in England & Wales, and the Joint Cooperation Centre in the Czech Republic.

Information exchange is an essential cornerstone for an administrative approach to work. Particularly the flow of information from law enforcement agencies and the Tax authorities to administrative bodies is sometimes problematic, and may require specific agreements also to ensure proper data protection.

Our study shows that, although they vary widely, coordinated responses to crime problems that involve different government agencies are far from a new or revolutionary concept. All of the Member States studied here have applied the idea of 'working apart together' to address crime problems and public order disturbances. Long-term cooperation, however, only seems to occur when a problem is perceived as extraordinarily serious. Examples are the mafia in Italy, extreme violence caused by organized criminals in Sweden, ecstasy production in the Netherlands, VAT-related fraud in Poland, and organized crime in general in England & Wales. The fact that multi-agency cooperation requires a severe problem also puts the continuity of such initiatives at risk. As soon as the sense of urgency wanes, particularly at the higher management and political levels, cooperation initiatives tend to fade away, slowly but surely. One can therefore conclude that cooperation, although much more effective than uncoordinated efforts, is far from being the 'natural' approach to complex crime problems. There is still a lot of work to be done.

Finally, some remarks are appropriate with regard to the cross-border exchange of information from law enforcement agencies and the tax authorities to administrative bodies (see part IV for a legal analysis of this topic). Generally, our empirical research revealed that such requests are not yet common, as in most countries included in our research an administrative approach to serious and organised crime is still developing. However, forerunners such as Italy, the Netherlands and Belgium do mention serious difficulties in exchanging relevant ‘soft’ police information with other Member States because the current legal framework only applies to ‘hard’ convictions. The problem concerns exchange of ‘soft’ information for official use in particular: law enforcement agencies and the tax authorities may exchange such information obtained from abroad informally with the competent administrative bodies, but then it cannot be used to base administrative decisions on. In such cases, the lack of a clear legal framework for information exchange is highly frustrating for authorities that want to apply an administrative approach and enables criminals to circumvent screening and avoid repressive interventions.

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**PART IV**

**THE CROSS-BORDER DIMENSION IN THE**

**EU**





## 14 THE POTENTIAL FOR INFORMATION EXCHANGE IN EUROPE FOR THE PURPOSE OF AN ADMINISTRATIVE APPROACH TO CRIME

*M. Peters & A.C.M. Spapens*

### 14.1 INTRODUCTION

In scope of the administrative approach to crime, it is essential to report on the potential for information exchange within the European Union, since criminals make use of the Area of Freedom, Security and Justice (AFSJ) to conduct their business. When applying administrative measures to prevent criminals from misusing legal infrastructures, the authorities deem information from across the borders necessary due to the continuing integration of the EU. For instance, displacement effects are found from the Netherlands to Belgium due to application of an administrative approach in the Netherlands.

The underlying report first provides a discussion on whether the Treaty on the Functioning of the EU (TFEU) provides a foundation for drafting EU regulations concerning information exchange supporting an EU-wide administrative approach and, if this is insufficient, which other regulatory forms can be used to integrate information exchange in support of an administrative approach (Section 14.2).

Second, we look at current instruments in the AFSJ that may provide a basis for information exchange in support of an administrative approach. We distinguish between legislative instruments (Section 14.3.1) and organizational structures supporting the exchange of information in the European Union (Section 14.3.2). We discuss each relevant instrument and, if applicable, provide the name, implementation date and implementing Member States and describe the type of information that can be shared, under which conditions and by which authorities. We analyse whether the instruments discussed can currently provide a basis for exchanging information in support of an administrative approach. We also look at the possible applicable data protection regime (Section 14.3.3).

As this chapter focuses on the potential for information exchange, the instruments as discussed above will be researched. This means that the report only indirectly deals with issues of privacy and data protection, i.e. in the framework of the discussed instruments. Questions of privacy and data protection however are of significant importance and should not be overlooked when using or developing instruments for information exchange.

## 14.2 THE POSSIBILITY OF THE EU REGULATING A EUROPEAN ADMINISTRATIVE APPROACH

In this section, we discuss the following question.

*Is the EU legislator competent to create a legal instrument that allows administrative authorities to exchange information internationally with direct counterparts and with other relevant authorities such as the police, judicial authorities, tax authorities, etc., in support of an administrative approach to crime?*

To apply the methods as described in the definition, administrative authorities need information about the persons involved. Currently, there is no instrument at EU level specifically addressing the need of administrative authorities to exchange information in order to prevent criminals from using legal infrastructures.<sup>1</sup> Below, we discuss the options offered by Title V of the TFEU (Section 14.2.1), and address the possibilities presented by the integration of the Prüm Convention into the EU legal framework (Section 14.2.2).

### 14.2.1 *Potential for regulating information exchange in support an administrative approach under the Area of Security, Freedom and Justice*

Because the administrative approach to crime addresses crime prevention through means other than criminal law, the legal basis for legislative instruments at the EU level must be sought in the Area of Security, Freedom and Justice (ASFJ).<sup>2</sup> Title V of the TFEU addresses this area, which combines part of the former first and third pillars. According to Article 4 paragraph 2 under j TFEU, the Member States and the Union have shared competence concerning the area. This implies that both the Member States and the European Union can legislate and adopt legally binding acts on topics assigned to this area. The Member

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1 This does not mean however that under certain existing instruments in the AFSJ, information designed for police and judicial cooperation could not be exchanged to support an administrative approach. This will be addressed under Section 14.3.

2 Title XXIV of the TFEU addresses administrative cooperation. Article 197 TFEU, the sole article in Title XXIV, regulates the implementation of Union law by the Member States, which is regarded as essential for the proper functioning of the EU. In this context, the Member States should improve their administrative capacity to implement Union Law. The wording of this article makes clear that this provision is not intended to cover cooperation and information exchange between administrative authorities to combat crime, but rather to facilitate the implementation of EU law, regardless of the topic. A discussion of Article 197 TFEU thus falls outside the scope of this report.

States may exercise their competence in so far as that the Union has not exercised or ceased the exercise of its competence.<sup>3</sup>

Several topics fall within the scope of the AFSJ. First of all, the AFSJ ensures absence of internal borders for persons; it furthermore encompasses a common policy on asylum, immigration and external border controls (former first pillar)<sup>4</sup> and ensures a high level of security by means of measures to combat crime, racism and xenophobia and to facilitate coordination and cooperation between the police, judicial authorities and other competent authorities, and through the mutual recognition of judgments in criminal matters and the approximation of criminal laws if necessary.<sup>5</sup> Last, access to justice is provided for under the AFSJ.<sup>6</sup>

Although several articles mention ‘administrative cooperation’<sup>7</sup> or ‘administrative measures’,<sup>8</sup> they do not touch on the subject of this report. For instance, Article 74 TFEU specifies that the Council will adopt measures for administrative cooperation between the relevant departments of the Member States and between those departments and the Commission concerning the topics referred to in the whole of Title V. However, this does not refer to cooperation between administrative authorities, but to administrative cooperation between judicial and police departments in the Member States. Article 75 refers to a framework of administrative measures aiming to include capital movement and payments for counter-terrorism purposes. These topics fall outside the scope of this report.

For the purposes of this report, the focus will lie on Chapter 2, 4 and 5 of Title V, which concern Policies on Border Checks, Asylum and Immigration, Judicial Cooperation in Criminal Matters and Police Cooperation, respectively. Chapter 3 is irrelevant for this report, since it concerns judicial cooperation in civil matters. We discuss these chapters in order to study whether the TFEU provides a legal basis for the EU to produce legislation on information exchange in support of an administrative approach.

### **Policies on Border Checks, Asylum and Immigration**

The policies that can be developed under Chapter 2 of Title V of the TFEU concern the absence of internal border controls and the monitoring and checking of persons crossing the external borders.<sup>9</sup> For these purposes, the Parliament and the Council can adopt several measures in accordance with the policies stated above.<sup>10</sup> Chapter 2 does not comprise explicit policies on information exchange between Member States or other relevant bodies.

3 Article 2 paragraph 2 TFEU.

4 Article 67 paragraph 2 TFEU and Chapter 2 of Title V TFEU.

5 Article 67 paragraph 3 TFEU.

6 Article 67 paragraph 4 TFEU.

7 Article 74 TFEU.

8 Article 75 TFEU.

9 Article 77 paragraph 1 TFEU.

10 Article 77 paragraph 2 TFEU.

### **Judicial Cooperation in Criminal Matters**

Article 82 paragraph 1 TFEU permits the European Parliament and Council to adopt measures for judicial cooperation in criminal matters in accordance with the ordinary legislative procedure. These include the possibility of adopting measures for cross-border recognition of judgments and judicial decisions throughout the EU (sub a), preventing and settling jurisdiction conflicts (sub b), supporting the training of the judiciary and judicial staff (sub c) and facilitating cooperation between judicial or equivalent authorities in relation to proceedings in criminal matters and the enforcement of decisions (sub d). Directives under the ordinary legislative procedure may be adopted to establish minimum rules in criminal procedure for the purpose of facilitating the mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension.<sup>11</sup> If a draft directive conflicts with their national legal system, Council Members may refer the draft to the Council and suspend the ordinary legislative procedure in the process. At the same time, other Member States may establish enhanced cooperation if they so wish and there are at least nine that wish to do so.<sup>12</sup>

Since the scope of Article 82 specifically concerns criminal procedure, this article cannot form the legal basis for an administrative approach to crime as defined in the introductory section of this report.

Article 83 continues by providing a legal basis for establishing minimum rules concerning the definition of criminal offences and sanctions for specifically defined serious crimes with a cross-border dimension.<sup>13</sup> Since this article defines criminal offences and sanctions and provides relevant minimum rules, it cannot provide a legal basis for establishing a new regulatory instrument for the administrative approach to crime; after all, it offers no room for preventive or other measures based on national administrative law. Article 85 concerns Eurojust and Article 86 the establishment of a European Public Prosecutor's Office within the scope of Eurojust. Hence, both articles do not provide a basis for information exchange in support of an administrative approach.

A provision offering a legal basis for the Council and Parliament to initiate legal actions for an administrative approach to crime would be Article 84 TFEU:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of member states in the field of crime prevention, excluding any harmonization of the laws and regulations of the Member States.

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11 Article 82 paragraph 2 TFEU.

12 Article 82 paragraph 3 TFEU.

13 Article 83 paragraph 1 TFEU.

This article deals directly with crime prevention. The article is somewhat overlooked and moreover quite ambiguous in its formulation.<sup>14</sup> Nonetheless, it creates competence for the EU to act in the scope of an administrative approach to crime.

First, the provision formulated in article 84 TFEU does not condone proposals aiming to harmonise laws and regulation of the Member States. Limitations also apply considering the objectives set by the provision itself, which is however relatively general, i.e. crime prevention.<sup>15</sup> The definition of ‘crime prevention’ is based on the broad definition posed in Council Decision 2001/427/JHA,<sup>16</sup> which encompasses an administrative approach to crime as defined in this study. Moreover, the article is not limited to certain criminal or cross-border offences, and thus constitutes a significant potential for European influence on crime prevention.<sup>17</sup> In the scope of the article, the Council and Parliament can take measures to ‘promote and support’ the actions of Member States under the ordinary legislative procedure. More concrete, they can promote and support the Member States by coordinating exchanges of best practices, monitoring and evaluating actions in the field. Furthermore, the Council and Parliament can pass laws to establish ‘incentive measures’ as long as this does not involve harmonisation of law or regulations of the Member States. This means that the EU can intervene by ‘persuasive soft law’. Based on article 76 TFEU the Commission can submit proposals for measures as well as a quarter of the Member States. Save from the exact terminology, these measures do constitute legally binding acts.<sup>18</sup> Hence, the legislative power that can be derived from this article is more broad than the provision initially suggests.<sup>19</sup>

Considering the above, initiatives by the Council and Parliament in the field of an administrative approach to crime can be based on article 84 TFEU, as the foregoing definition of crime prevention allows for administrative measures to be included. One such action would be to agree to include a multilateral convention in the EU legal sphere, as has occurred for the Prüm Treaty, discussed in Section 14.2.2.

14 Craig 2010, p. 367.

15 Craig 2010, p. 175.

16 Lenz & Borchardt 2010, p. 1101. This very broad definition is regulated by article 1 under 3 of the Council Decision 2001/427/JHA: *Crime prevention covers all measures that are intended to reduce or otherwise contribute to reducing crime and citizens’ feeling of insecurity, both quantitatively and qualitatively, either through directly deterring criminal activities or through policies and interventions designed to reduce the potential for crime and the causes of crime. It includes work by government, competent authorities, criminal justice agencies, local authorities, and the specialist associations they have set up in Europe, the private and voluntary sectors, researchers and the public, supported by the media.*

17 Sieber et al. 2011, p. 124.

18 Craig 2010, p. 175.

19 Craig 2010, p. 176.

## Police cooperation

Chapter 5 of Title V TFEU provides for the establishment of measures concerning police cooperation. Although this chapter does provide a legal basis for information exchange, Articles 87 to 89 TFEU refer to either the police or other *law enforcement* authorities. Since the scope of an administrative approach involves administrative authorities, no legal basis can be found in this section. One solution would however be to amend the treaty to include administrative authorities.

## Conclusion

As shown above, the only possible basis in the TFEU for legislation concerning information exchange in support of an administrative approach to crime would be Article 84 TFEU. Having said that, Article 84 TFEU demands action on the part of the Member States, which the EU can support or promote. The initiative to exchange information in support of an administrative approach to crime therefore lies with the Member States.

Another possible, but very ambitious option is to adjust the provisions on information exchange for police cooperation purposes. This can be done by adding ‘administrative authorities’ to ‘police authorities’ and ‘other law enforcement authorities’ as provided in Articles 87 to 89 TFEU.

### 14.2.2 *Possibility of including multilateral treaties under the framework of the EU as offered by the integration of the Prüm Decision*

In 2005, seven EU Member States decided to promote mutual recognition in the area of police cooperation, with the Prüm Treaty serving as their pilot project.<sup>20</sup> In 2008, the EU adopted a Framework Decision that incorporated crucial parts of the treaty into the Union’s legislative framework. The substantive provisions of the Prüm arsenal and their usefulness for an administrative approach will be discussed in Section 14.3 of this report. Here, we reflect on how the Prüm Treaty became part of the EU’s legal framework, i.e. by its transposition from Prüm Treaty into Prüm Council Decision.<sup>21</sup> We analyse whether such a process might also be beneficial for developing regulations governing an administrative approach to crime.

The Prüm Process had two distinct phases. The first involved multilateral agreement on the Prüm Treaty. Germany organized a meeting with the Benelux countries and Austria in 2003. On 28 May 2004, these countries undertook to cooperate more closely on

20 Guild & Geyer 2008, p. 11. These countries include the Netherlands, France, Luxembourg, Belgium, Germany, Austria and Spain.

21 Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, O.J. L 210, 6 August 2008, p. 1–11.

exchanging information on organized crime, among other matters.<sup>22</sup> The multilateral treaty agreed at Prüm on 27 May 2005 between these countries, France and Spain expressed the same intentions as the earlier declaration.<sup>23</sup> Like all international treaties, the Prüm Treaty was subject to the international and national laws of the contracting parties.<sup>24</sup> This meant that after the Treaty was negotiated by the national governments and subsequently signed, the national parliaments of the Contracting Parties had to ratify the international instrument.<sup>25</sup> The national parliaments can only decide whether to ratify the treaty or to stop the ratification procedure. They have no formal say about the negotiations conducted previously by their governments.<sup>26</sup> The role of the European Parliament and European Commission is limited in this phase. The only measure open to them is to challenge the Treaty before the European Court of Justice, based on an infringement of the principle of loyalty.<sup>27</sup> Such proceedings played no role in the Prüm Process, however.

The preamble to the Prüm Convention had foreseen that the Prüm Treaty could be integrated into the EU legal framework:

*“Seeking to have the provisions of this Convention brought within the legal framework of the European Union, in order to improve exchange of information within the European Union[...]”*

Germany initiated the second phase of the Prüm process in March 2006.<sup>28</sup> Before the decision to integrate the Prüm Treaty into EU legislation as a Council Decision, two other options were also considered, namely integration via enhanced cooperation or the *acquis* via the ratification of the Treaty by all EU Member States.<sup>29</sup> Eventually, a decision was taken to integrate the essential provisions of the Prüm Treaty via a Council Decision.<sup>30</sup> The legislative process regarding the formation of Council Decisions is based on former Title VI of the Treaty on the European Union (TEU). Since the implementation of the Lisbon Treaty, the legal basis on which the Prüm Treaty was incorporated into the EU legal system has been changed. Below, we describe the Prüm process as it took place under the old legislation. We then discuss which legal basis could now be used to implement a multilateral or bilateral Treaty or Convention into the EU legal order.

22 *Kamerstukken II* 2006/07 30 881, nr. 3, p. 1.

23 *Kamerstukken II* 2006/07 30 881, nr. 3, p. 1.

24 Bellanova 2007, p. 204.

25 Bellanova 2007, p. 204.

26 Bellanova 2007, p. 204.

27 Bellanova 2007, p. 204.

28 Bellanova 2007, p. 205-206.

29 Bellanova 2007, p. 206.

30 Bellanova 2007, p. 206.

In the process leading to the Prüm Decision, Article 34 (2) TEU (old) determined that the Council could adopt decisions concerning police and judicial cooperation in judicial matters. The Member States and the Commission had the power to propose such a decision. For the adoption of a Council Decision, unanimity is required. Limitations imposed by Article 34(2) TEU (old) are the exclusion of approximation of the laws and regulations of the Member States and the fact that the Decision shall not entail direct effect. The Council was able to adopt measures to implement such decisions by qualified majority.<sup>31</sup> The European Parliament played a consultative role and needed to be informed regularly according to Article 39 paragraph 2 TEU (old). In the Prüm Process, the European Parliament proposed seventy amendments to the Prüm Decision, mostly concerning data protection and the applicability of the principles of necessity and proportionality on information exchange.<sup>32</sup> However, these amendments were never negotiated in the Council.<sup>33</sup> The role of the national parliaments as well as the national data protection authorities and the European Data Protection Supervisor was limited in the process of transposing the Prüm Treaty into the Prüm Decision.<sup>34</sup>

With the implementation of the Lisbon Treaty, the provisions of Title VI of the former TEU concerning police and judicial cooperation in criminal matters were repealed and replaced by Title V of the TFEU.<sup>35</sup> Article 34 as such has not been transposed, but – as discussed earlier – Article 84 TFEU could form a viable basis for transposing a treaty, convention or agreement between EU Member States into EU law. After all, this article determines that the European Parliament and Council may establish ‘measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonization of the laws and regulations of the Member States.’ The latter limitation is a reflection in Article 84 TFEU of former Article 34 TEU (old).

#### 14.3 APPLICABILITY OF EXISTING INSTRUMENTS ON INFORMATION EXCHANGE IN THE EU MEMBER STATES – THE LEGISLATIVE FRAMEWORK

In 1985, five European countries agreed to abolish their common borders. The Schengen Convention of 1990, which executed the 1985 agreement, included provisions on information exchange. Since then, many other instruments, such as the Swedish Initiative and the Prüm Decision, contain provisions on information exchange between the Member States

31 Bellanova 2007, p. 206.

32 Bellanova 2007, p. 207-208.

33 Bellanova 2007, p. 207-208.

34 Bellanova 2007, p. 207-208.

35 Council of the European Union, Consolidated versions of the Treaty on European Unions and the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union, 6655/7/08 REV 7, Brussels, 12 November 2012, p. 460.



of the European Union, spurred by 9/11 and the Madrid and London bombings. We can distinguish two types of instruments: those that regulate information exchange concerning the internal borders, and those that are meant to regulate the external frontiers of the European Union, such as the exchange of Passenger Name Records (PNR) with third countries. The latter instruments fall outside the scope of this report.

Below, we discuss instruments containing provisions relevant to the exchange of information related to an administrative approach to crime. We distinguish between (1) legislative instruments regulating information exchange that may be used to support an administrative approach (Section 14.2.1), (2) the legislative instruments regulating the protection of personal and other data and the associated EU legislative process (Section 14.2.2) and (3) the organizational structures used for information exchange (Section 14.2.3).

#### 14.3.1 *The Schengen Convention*<sup>36</sup>

The Schengen Convention allows for the exchange of personal data between the police authorities of the Contracting Parties. The goal of the Schengen Convention is to abolish the internal borders between the Contracting Parties. Although the United Kingdom is not a part of the Schengen Convention, it does participate in police cooperation aspects and in the Schengen Information Systems (SIS I and II).<sup>37</sup>

Title III of the Schengen Convention concerns police cooperation between the Contracting Parties. Article 39 paragraph 1 Schengen Convention states:

The Contracting Parties undertake to ensure that their police authorities shall, in compliance with national law and within the scope of their powers, assist each other for the purposes of preventing and detecting criminal offences, in so far as national law does not stipulate that the request has to be made and channelled via the judicial authorities [...].

The obligation to assist each other includes the exchange of personal data.<sup>38</sup> Paragraph 2 continues by saying that written information exchanged via the principle of paragraph 1 can only be utilized as evidence for a charged offence when the judicial authorities of the requested Contracting Party give the requesting police authorities permission to do so. The ‘written information’ under paragraph 2 therefore only includes information intended

36 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Schengen 19 June 1990 O.J. L239, 22/09/2000 P. 0019 – 0062.

37 Brussels 7 December 2012, COM (2012) 735, p. 5. With the exception of alerts relating to third-country nationals on the entry ban list.

38 *Kamerstukken II* 2006-2007, 23 490, nr. 444, p. 2; Van Daele et al. 2010, p. 401.

for criminal procedures.<sup>39</sup> Further agreements can be made between the competent Ministers of the Contracting Parties concerning cooperation in border regions, according to paragraph 4 of Article 39.

In individual cases and according to Article 46, the Contracting Parties may send each other information spontaneously, such as police data meant to help the other Contracting Party to combat future crime and prevent offences against or threats to public policy and public security. The information exchange can take place between central authorities, but also directly between the police authorities involved.<sup>40</sup>

The types of information that can be shared between the Contracting Parties via the Schengen Information System are mentioned in Articles 94 to 101 of the Schengen Convention. They comprise personal data (Articles 94-99), data vehicles (Article 99) and objects (including vehicles) for seizure or for use as evidence in criminal cases (Article 100). The exchange of personal data under Article 94 paragraph 3 is limited to specific types of personal data.<sup>41</sup> Any exchange of information other than those types is not authorized, especially information identified in the first sentence of Article 6 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981.<sup>42</sup>

Title VI of the Schengen Convention provides for the protection of personal data, more specifically in Article 126 paragraph 1. The protection of personal data must be arranged via national legislation, and such protection needs to be as strict or stricter than the obligations imposed under the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981. According to Article 126 paragraph 3, the requirements for the exchange of personal data are as follows.

1. *The personal data cannot be used for goals other than those for which the Schengen Convention provides (sub a), unless prior consent has been given by the requested Contracting Party and in accordance with the national law of the requested Contracting Party;*<sup>43</sup>
2. *The personal data can only be used by judicial authorities and the departments and authorities carrying out tasks or performing duties in connection with the purposes referred to in Article 126 paragraph 3 sub a (sub b);*

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39 Van Daele et al. 2010, p. 401.

40 Van Daele et al. 2010, p. 401.

41 Article 94 paragraph 3 sub a to j specifies the types of information: surname, forenames, aliases, specific objective personal characteristics not subject to change, first letter of second forename, date and place of birth, sex, nationality, whether the persons concerned are armed and/or violent, reasons for the alert and actions to be taken.

42 Which means racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life.

43 Van Daele et al. 2010, p. 402.

3. *Article 126 is limited in its use, however. It does not apply to Chapter 7 of Title II and Title IV. The requirements of Article 126 paragraph 3 also do not apply to Title III Chapters 2, 3, 4 and 5.*<sup>44</sup>

Regarding the exchange of personal data for police cooperation, Article 39 and further, separate requirements are laid down in Article 129 of the Schengen Convention. First, the level of data protection, irrespective of the provisions set out in Articles 126 and 127, must comply with the principles of Recommendation No R (87) 15 of 17 September 1987 of the Committee of Ministers of the Council of Europe regulating the use of personal data in the police sector.<sup>45</sup>

Additional requirements have been formulated for the application of Article 46 of the Schengen Convention regarding ‘spontaneous information exchange’:

- the principle of purpose. The receiving Contracting Party may only use the personal data for the purposes determined by the distributing Contracting Party, bearing in mind the requirements as been established by the distributing Contracting State (Article 129 sub a);
- the prohibition against continuous distribution to authorities other than police and judicial authorities without prior consent (Article 129 sub b);
- at the request of the distributing Contracting Party, the receiving Contracting Party must provide information about the how the exchanged information has been used, as well as the results stemming from the exchange (Article 129 sub c).

The foregoing implies that the Schengen Convention does provide a basis for information exchange in support of an administrative approach, namely when such information is exchanged on request (Article 39 in conjunction with Article 126 paragraph 3 sub a of the Schengen Convention). Prior consent from the requested Contracting Party as well as compliance with the laws of the requested Contracting Party is necessary, since application within an administrative setting means abandoning the purposes defined by the Schengen Convention. Spontaneous information exchange is also possible for an administrative approach according to Article 46 in conjunction with Article 129 sub a and b. Use of such information in the context of the administrative approach to crime requires prior double consent. First, the distributing Contracting Party must consent to the use of police and personal data in the context of an administrative approach (sub a). Second, since the information can only be distributed to police authorities, consent is needed to distribute the information to administrative authorities (sub b).

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44 Van Daele et al. 2010, p. 402.

45 Van Daele et al. 2010, p. 403.

14.3.2 *The EU Convention on Mutual Assistance in Criminal Matters*<sup>46</sup>

Article 1 of the EU Convention on Mutual Assistance in Criminal Matters specifies the goal of the Convention: to supplement and facilitate mutual legal assistance in criminal matters. The EU Convention superseded Articles 49 sub a, 52, 53 and 73 of the Schengen Convention, which previously regulated mutual legal assistance in criminal matters.<sup>47</sup>

With regard to information exchange in support of an administrative approach, the name of the EU Convention on Mutual Assistance in Criminal Matters suggests that the scope of application is limited to assistance in criminal matters. Article 3 states:

*Mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.*

Under this provision, information exchange in support of an administrative approach would seem impossible. Although the administrative authorities are authorized to exchange information, the condition that the infringements must be punishable under national law and that a decision regarding these infringements may give rise proceedings before a criminal court hinders exchanges on a broader administrative scale.<sup>48</sup> National legislation that fits within the limited scope of Article 3 includes the Dutch Traffic Regulations (Administrative Enforcement) Act.<sup>49</sup>

Second, Article 7 allows for spontaneous information exchange:

*Within the limits of their national law, the competent authorities of the Member States may exchange information, without a request to that effect, relating to criminal offences and the infringements of rules of law referred to in Article 3(1), the punishment or handling of which falls within the competence of the receiving authority at the time the information is provided.*

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46 Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 29 May 2000, O.J., C197/1.

47 Article 2 paragraph 2 of the EU Convention on Mutual Assistance in Criminal Matters; Van Daele et al. 2010, p. 405.

48 Van Daele et al. 2010, p. 406.

49 *Wet administratiefrechtelijke handhaving verkeersvoorschriften* (WAHV).

This provision is a reflection of Article 46 of the Schengen Convention,<sup>50</sup> which regulates spontaneous information exchange between police authorities. Article 7 of the EU Convention mirrors this for the judicial authorities,<sup>51</sup> for which such a provision did not previously exist.<sup>52</sup> Since this article refers to the provisions as laid down by Article 3, information exchange for administrative purposes on a broad scale is impossible.

Article 23 of the EU Convention on Mutual Assistance in Criminal Matters regulates the protection of personal data. It should be noted that this article regulates *only* the protection of personal data and no other types of information.<sup>53</sup> When personal data is exchanged under the provisions of the Convention, the goals for which the data can be used are:

- a. for the purpose of proceedings to which this Convention applies;
- b. for other judicial and administrative proceedings directly related to the proceedings referred to under (a);
- c. for preventing an immediate and serious threat to public security;
- d. for any other purpose, but only with the prior consent of the communicating Member State, unless the Member State concerned has obtained the consent of the data subject.

This article suggests that when the personal data has already been exchanged in support of criminal proceedings, the receiving Member State could ask for permission to use the information for other purposes under points c and d. Again, this is mirrored by the Schengen Convention, which allows for uses other than the initial purpose of the information exchange when the distributing Member State has given its prior consent. For the purposes of an administrative approach, a sharp distinction must be made between:

- the goals on which the requests for the exchange of personal data or spontaneous exchange of personal data can be based (Articles 3 and 7) and;
- the use of the personal data received after exchange for *goals other than* the initial goal, with the prior consent of the distributing Member State.<sup>54</sup>

In conclusion, the personal data exchanged under the EU Convention on Mutual Assistance in Criminal Matters can be used for administrative purposes, but the prior consent of the distributing Member State is necessary. Since Article 23 only concerns personal data, Articles 3 and 7 regulate the exchange of other types of information. This means that the Convention does not regulate the use of non-personal data for purposes other than those identified under Articles 3 and 7.

<sup>50</sup> Van Daele et al. 2010, p. 406.

<sup>51</sup> Van Daele et al. 2010, p. 406.

<sup>52</sup> *Kamerstukken II* 2001-2002, 28 350, nr. 3, p. 12-13.

<sup>53</sup> *Kamerstukken II* 2001-2002, 28 350, nr. 3, p. 31.

<sup>54</sup> See also *Kamerstukken II* 2001-2002, 28 350, nr. 3, p. 30.

### 14.3.3 *The Swedish Initiative*<sup>55</sup>

The Swedish Initiative is a framework decision, which means that the results to be achieved are binding on the Member States, but that the means for achieving those results are up to them.<sup>56</sup> Framework decisions lack direct effect.<sup>57</sup> The goal of the Swedish Initiative is explained in Article 1 paragraph 1:

The purpose of this Framework Decision is to establish the rules under which Member States' law enforcement authorities may exchange existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations or criminal intelligence operations.

The principle of 'equivalent access' is applicable to the Swedish Initiative, which means that the requesting Member State's access to information is regulated as strictly as for a national authority.<sup>58</sup>

Article 2 identifies which authorities are 'competent law enforcement authorities' for the purposes of this framework decision:

[...] a national police, customs or other authority that is authorised by national law to detect, prevent and investigate offences or criminal activities and to exercise authority and take coercive measures in the context of such activities. Agencies or units dealing especially with national security issues are not covered by the concept of competent law enforcement authority [...].

The Member States file a declaration substantiating which national authorities are indicated as competent law enforcement authorities for the purposes of this framework decision.

Article 2 also defines 'criminal investigation' (sub b), 'criminal intelligence operation' (sub c), 'information and/or intelligence' (sub d) and 'offences referred to in Article 2(2) of the Framework Decision 2002/584/JHA on the European arrest warrant' (sub e). The definition of 'criminal investigation' offers no room for an administrative approach, but the definition of 'criminal intelligence operation' does:

a procedural stage, not yet having reached the stage of a criminal investigation, within which a competent law enforcement authority is entitled by national

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55 Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, *O.J. L* 386/89.

56 Van Daele et al. 2010, p. 425-426.

57 Van Daele et al. 2010, p. 425-426.

58 COM (2012) 735, p. 3; COM (2010) 385, p. 10.

law to collect, process and analyse information about crime or criminal activities with a view to establishing whether concrete criminal acts have been committed or may be committed in the future.

An administrative approach to crime might fall under this definition, especially if it concerns investigations screening the criminal backgrounds of applicants for subsidies, tenders and permits, such as the Dutch BIBOB legislation.<sup>59</sup>

According to the Swedish Initiative, information and/or intelligence can be exchanged upon request (Article 3 paragraph 2) or spontaneously (Article 7). Information and/or intelligence for the purposes of the Swedish initiative means:

- any type of information or data which is held by law enforcement authorities, and;
- any type of information or data which is held by public authorities or by private entities and which is available to law enforcement authorities without the taking of coercive measures, in accordance with Article 1(5).

Spontaneous information exchange is only possible when there are reasons to believe that this could assist in investigations relating to the offences referred to in Article 2(2) of Framework Decision 2002/584/JHA.<sup>60</sup>

Article 6 of the Initiative explains that the information exchange takes place via the existing channels for international law enforcement cooperation, which means that – depending on the type of information and the purpose of information exchange – all the channels and structures discussed below, with their limitations, can be used.<sup>61</sup>

Article 8 provides the data protection applicable to information exchange as regulated by the Swedish Initiative. Paragraph 2 declares the national data protection laws and the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data applicable, along with the Additional Protocol of 8 November 2001 of that Convention where ratified by the relevant Member States. Also, Recommendation No. R(87) 15 of the Council of Europe Regulating the Use of Personal Data in the Police Sector is declared relevant when handling personal data for the purposes of the Swedish Initiative. Article 8 paragraph 3 furthermore determines:

Information and intelligence provided under this Framework Decision may be used by the competent law enforcement authorities of the Member State to

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<sup>59</sup> Van Daele et al. 2010, p. 427.

<sup>60</sup> Such as participation in criminal investigations, illicit drug trade, money laundering, etc.; Van Daele et al. 2010, p. 427.

<sup>61</sup> Article 6 Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, O.J. L 386/89.

which it has been provided solely for the purposes for which it has been supplied in accordance with this Framework Decision or for preventing an immediate and serious threat to public security; processing for other purposes shall be permitted solely with the prior authorization of the communicating Member State and subject to the national law of the receiving Member State. The authorization may be granted insofar as the national law of the communicating Member State permits.

This implies that information exchange can take place outside the initial purpose of the Swedish Initiative, but that prior consent is necessary. Also, the requested Member State is not obliged to exchange said information. Article 10 provides reasons for withholding information or intelligence: jeopardizing national security, a criminal investigation, an intelligence operation, and the safety of individuals, and disproportionate or irrelevant requests.

In conclusion, information exchange can take place as part of a ‘criminal intelligence operation’, both on request or spontaneously, as long as there is prior authorization by the distributing Member State and compliance with the national law of the distributing Member State.

#### 14.3.4 *The Prüm Convention and Prüm Decision*

The Prüm Convention<sup>62</sup> builds on the Schengen Convention (amongst others). In order to integrate the Prüm Convention into the legal framework of the European Union, the Council decided to enact the Prüm Decision.<sup>63</sup> According to Articles 1 of the Prüm Convention and the Prüm Decision, the main goal of the instrument is to intensify cross-border cooperation.<sup>64</sup> Hereafter, we will take the Prüm Decision as the principle lead in our discussion, unless otherwise indicated. Article 2-7 of the Decision regulate the exchange of DNA analysis files and profiles, Article 8-11 fingerprinting data and Article 12 vehicle registration data. Article 13 of the Prüm Decision regulates the exchange of non-personal data:

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62 Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, Prüm 27 May 2005.

63 Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, *O.J.* 2008 L210/1.

64 Van Daele et al. 2010, p. 412.



For the prevention of criminal offences and in maintaining public order and security for major events with a cross-border dimension, in particular for sporting events or European Council meetings, Member States shall, both upon request and of their own accord, in compliance with the supplying Member State's national law, supply one another with any non-personal data required for those purposes.

Article 14 of the Prüm Decision regulates the exchange of personal data:

For the prevention of criminal offences and in maintaining public order and security for major events with a cross-border dimension, in particular for sporting events or European Council meetings, the Contracting Parties shall, both upon request and of their own accord, in compliance with the supplying Contracting Party's national law, supply one another with personal data if any final convictions or other circumstances give reason to believe that the data subjects will commit criminal offences at the event or pose a threat to public order and security, in so far as the supply of such data is permitted under the supplying Contracting Party's national law.

Paragraph 2 of Article 14 furthermore states that the data exchanged may be used only for the goals determined under paragraph 1 of Article 14 and only for the particular event for which the data was exchanged.

At first glance, Articles 13 and 14 seem to be too limited in scope for the administrative approach, since they mainly concern major cross-border events.<sup>65</sup> Depending on how one interprets 'major events', an administrative approach would fall within the scope of Articles 13 and 14.<sup>66</sup>

Article 27 of the Prüm Convention provides a non-exhaustive list concerning the exchange of personal data.<sup>67</sup> This means that Article 27 could be used to cover other requests

65 Van Daele et al. 2010, p. 413.

66 Van Daele et al. 2010, p. 413.

67 Van Daele et al. 2010, p. 414. The Contracting Parties specifically assist one another with: (1) identifying owners and operators of vehicles and providing information on drivers, masters and captains of vehicles, vessels and aircraft; (2) supplying information on driving licences, navigation licences and similar permits; (3) ascertaining individuals' whereabouts and place of residence; (4) checking on residence permits; (5) ascertaining the identity of telephone subscribers and subscribers to other telecommunications services, where publicly accessible; (6) establishing the identity of individuals; (7) investigating the origin of items such as arms, motor vehicles and vessels (enquiries via trade channels); (8) supplying data from police databases and police records and supplying information from official records accessible to the public; (9) issuing urgent alerts concerning arms and explosives and alerts concerning currency counterfeiting and securities fraud; (10) supplying information on practical implementation of cross-border surveillance, cross-

for information.<sup>68</sup> Article 27 does not designate a competent authority; national law regulates this.<sup>69</sup> The Prüm Decision does not lay down any provision mirroring that of Article 27.

Both the Prüm Convention and the Prüm Decision arrange for the protection of personal data. Article 33 paragraph 1 sub 1 of the Convention and Article 24 paragraph 1 sub a of the Decision define the ‘processing of personal data’, which includes:

[...]any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, sorting, retrieval, consultation, use, disclosure by supply, dissemination or otherwise making available, alignment, combination, blocking, erasure or destruction of data. Processing within the meaning of this Convention shall also include communicating whether or not a hit exists.

Article 35 paragraph 1 of the Prüm Convention and Article 26 paragraph 1 of the Prüm Decision allow for the dissemination of personal data within the goals of the Convention. According to these articles, when a receiving Contracting Party wants to process the data received for other purposes, it must request prior authorization from the administering Contracting Party.

For the purposes of an administrative approach, when the exchange of personal data is requested, three criteria must be fulfilled under Article 35 paragraph 1 of the Prüm Convention and Article 26 paragraph 1 of the Prüm Decision: (1) the administering Contracting Party needs to give prior authorization; (2) the national law of the receiving Contracting Party has to allow the personal data to be used for the purpose of an administrative approach, and (3) utilization of the personal data is allowed by the national laws of the administering Contracting Party.<sup>70</sup> Possible problems can be foreseen with regard to Contracting Parties who are not permitted under national law to use such information to support an administrative approach.

Article 36 of the Prüm Convention and Article 27 of the Prüm Decision furthermore stress that only authorities competent to process the personal data may do such processing, such as furtherance data, and only for the purposes specified by Article 35 Prüm Convention and Article 26 Prüm Decision.<sup>71</sup>

In conclusion, the Prüm Convention and Prüm Decision could form a basis for information exchange relating to an administrative approach. Nevertheless, the three criteria

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border hot pursuit and controlled deliveries, and (11) ascertaining an individual's willingness to make a statement.

68 Van Daele et al. 2010, p. 414.

69 Van Daele et al. 2010, p. 414.

70 Van Daele et al. 2010, p. 415.

71 Van Daele et al. 2010, p. 415-416.

of Article 35 Prüm Convention and Article 26 Prüm Decision must be fulfilled in order to make the information exchange possible.

#### 14.3.5 *Naples II Convention*<sup>72</sup>

Article 1 paragraph 1 of the Naples II Convention regulates mutual assistance between customs administrations in the European Union to prevent, investigate and prosecute infringements of national and Community customs provisions.

There are two separate ways to exchange information under the Naples II Convention. First, exchange requests can be made under Article 10 to support the prevention, investigation and prosecution of infringements.<sup>73</sup> Second, Article 17 provides for spontaneous information exchange. This refers to the immediate exchange of information on planned or committed infringements as well as information regarding the goods involved and new methods for committing infringements.<sup>74</sup>

Both articles mention that basically all relevant information can be exchanged. However, for the protection of personal data, a special regime has been installed under Article 25 of the Naples II Convention. Article 4 paragraph 8 defines 'personal data' as follows.

[...]all information relating to an identified or identifiable natural person; a person is considered to be identifiable if he or she can be directly or indirectly identified, inter alia by means of an identification number or of one or more specific elements which are characteristic of his or her physical, physiological, psychological, economic, cultural or social identity.

Article 25 regulates data protection, with paragraph 1 first addressing the provisions laid down by the 1981 Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data. Paragraph 2 sub a allows the processing of personal data, but only for the purposes stated in Article 1 paragraph 1 of the Naples II Convention. The term 'processing' is defined with reference to Article 2 sub a and b of

72 Council Act 98/C 24/01 of 18 December 1997 drawing up, on the basis of Article K3 of the Treaty on European Union, the Convention on mutual assistance and cooperation between customs administrations, *O.J.* C 24 of 23.01.1998.

73 Based upon Article 4 of the Naples Convention 1967. See also the Explanatory Report on the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations *O.J.* C189 of 17 June 1998.

74 Based on Articles 8 and 9 of the Naples Convention 1967. Explanatory Report on the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations *O.J.* C189 of 17 June 1998.

Directive 95/46/EC on the protection of personal data.<sup>75</sup> The receiving Member State is allowed to forward and supply the information to its customs authorities, investigative authorities and judicial authorities for the prosecution and punishment of infringements under the Convention without the consent of the supplying Member State. Forwarding personal data for other purposes or to other authorities requires the consent of the supplying Member State. It is not must be given specifically prior to or after the forwarding of the personal data.

Based on the foregoing, the exchange of personal data in support of an administrative approach can take place when this specifically concerns the prevention of infringements of national or Community customs provisions. An example is the administrative enforcement of the Dutch *General Customs Act*.<sup>76</sup>

We may conclude that information exchange may take place under the Naples II Convention for the purposes of an administrative approach, whether on request or spontaneously. Restrictions apply when personal data are involved. Personal data can be exchanged only for the purposes cited in Article 1 of the Naples II Convention, which could be beneficial for an administrative approach as shown by the example above. Forwarding of received personal data for purposes other than those indicated under Article 1 of the Naples II Convention is only possible when the supplying Member State gives its consent.

#### 14.3.6 *The European Convention on the Service Abroad of Documents Relating to Administrative Matters*

According to Article 1 of the European Convention on the Service Abroad of Documents relating to Administrative Matters,<sup>77</sup> the Convention is meant to facilitate mutual assistance with regard to the service of documents relating to administrative matters. The Convention is not applicable to fiscal or criminal matters, although the Contracting Parties can, by means of a declaration, extend the scope of the Convention. Article 2 determines that each Contracting Party must establish a central authority to receive requests and take action accordingly. This central authority can facilitate in three instances, according to Article 6 of the Convention:

- for the service of documents in domestic actions upon persons who are within its [the Contracting Party's] territory (paragraph 1);

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<sup>75</sup> Article 25 paragraph 3 of the Naples II Convention. Explanatory Report on the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations O.J. C189 of 17 June 1998.

<sup>76</sup> Van Daele et al. 2010, p. 409.

<sup>77</sup> Council of Europe, Strasbourg, 24 November 1977. Via <http://conventions.coe.int/Treaty/en/Treaties/Html/094.htm>.

- by a particular method requested by the requesting authority (paragraph 1);
- the servicing of an addressee who accepts the document voluntarily (paragraph 2)

Article 14 of the Convention sets out the reasons for refusing to comply with a request.

They include (a) when the matter for which a request is made does not relate to administrative matters as determined under Article 1; (b) when the request interferes with the sovereignty, safety, public policy or other essential interests of the Contracting Party and (c) if the addressee cannot be found at the address indicated and his location cannot be determined easily. The refusal needs to be reported promptly to the requesting Contracting Party (paragraph 2 of Article 14).

The question is whether this Convention can benefit an administrative approach in Europe. Only eight countries in the Council of Europe have ratified it,<sup>78</sup> which limits its practical applicability.

#### 14.3.7 *The European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters*

Articles 1 and 2 of the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters<sup>79</sup> are similar to Articles 1 and 2 of the European Convention on the Service Abroad of Documents relating to Administrative Matters. The Convention discussed in this section regulates the type of document that can be sent in the scope of administrative matters. What constitutes an ‘administrative matter’ is left to the judgment of the Contracting Parties themselves, as no positive definition of the term is given.<sup>80</sup> Article 1 paragraph 2 leaves it to the discretion of the Contracting Parties whether to include fiscal matters. Criminal matters are excluded.<sup>81</sup> Nevertheless, Article 1 paragraph 2 of the Convention denotes the area of ‘administrative criminal law’ by allowing Contracting Parties to extend the scope of the Convention to such proceedings.<sup>82</sup> The explanatory report on the Convention refers to *Ordnungswidrigkeit* (as applicable in Germany) as an example of such proceedings.<sup>83</sup>

78 <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=094&CM=1&DF=&CL=ENG>. These countries are: Austria, Belgium, Estonia, France, Germany, Italy, Luxembourg and Spain; Van Daele et al. 2010, p. 434. Klip & Vervaele 2002, p. 9.

79 Council of Europe, Strasbourg, 15 March 1978, via: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=100&CM=1&CL=ENG>.

80 See the explanatory report on the Convention under 9-11, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

81 See the explanatory report on the Convention under 12, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

82 See the explanatory report on the Convention under 12, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

83 See the explanatory report on the Convention under 12, via: <http://conventions.coe.int/Treaty/en/Reports/>

Article 7 of the Convention lists the reasons for refusing to comply with a request for assistance. They include (1) when the matter to which the requests relates falls outside the scope of an administrative matter as defined in Article 1; (2) when compliance would interfere with the sovereignty, security, public policy or other essential interests of the requested State; (3) when compliance would interfere with fundamental human rights or with confidentiality and (4) when the request goes against domestic law or custom.

Under Article 13, Member States may furnish one another with information about the law, regulations and customs. According to the explanatory report on the Convention, the requests for information should adhere to a double criterion. First, the request should be made by an administrative authority as defined as such by the domestic law of the requesting state.<sup>84</sup> The fact that the term 'authority' is defined by domestic law allows for the inclusion of both administrative organs as well as authorities exercising judicial functions in administrative law.<sup>85</sup> Second, the request should be made for an administrative purpose.<sup>86</sup> Whether a request is made for administrative purposes is a matter to be determined by the requesting state's central authority, as established under Article 2 of the Convention.<sup>87</sup>

Article 14 regulates the exchange upon request of factual information and documents concerning administrative matters already in the possession of the requested Contracting Party. Again, the request should be made by an authority of the requesting state and for administrative purposes. These requirements match the criterion set out in Article 13.<sup>88</sup> The requests can extend to both nationals and non-nationals of the requested Contracting Party.<sup>89</sup> Article 15 allows the requesting state to ask the requested Contracting Party to take action to obtain information, i.e. making enquiries, albeit without using coercive powers, such as visiting premises for information.<sup>90</sup> The same double criterion applies as

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Html/100.htm.

84 See Article 1 European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters and the Explanatory report on the Convention, under 43-47, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

85 Explanatory report on the Convention under 43-47, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

86 Explanatory report on the Convention under 43-47, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

87 Explanatory report on the Convention under 43-47, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

88 Explanatory report on the Convention under 48, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

89 Explanatory report on the Convention under 48, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

90 Explanatory report on the Convention under 49, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

specified under Article 13.<sup>91</sup> Article 16 stipulates that the information requested may not be used for purposes other than specified in the request.<sup>92</sup>

Article 19 paragraph 1 of the Convention makes the exchange of evidence in administrative matters possible by an authority competent in such matters.<sup>93</sup> This includes judicial authorities competent to obtain evidence in administrative matters under specific domestic laws.<sup>94</sup> Evidence can only be requested in the case of administrative judicial procedures that have already commenced or are being contemplated.<sup>95</sup> The requested state can refuse a request if it is not made for the purposes of administrative proceedings before an administrative tribunal or any other authority exercising judicial functions in administrative matters.<sup>96</sup> This provision is supplementary to Article 7 paragraph 1 under a in conjunction with Article 1 of the Convention, thereby limiting the scope of the Convention's application.

At first glance, the provisions of this Convention appear to allow for the exchange of information and evidence between the administrative authorities of the Contracting Parties to the Council of Europe. Their practical value is limited, however; only six countries have ratified the Convention,<sup>97</sup> and commentators have criticized its broad scope as having 'unduly vague content',<sup>98</sup> inherently limiting its practical applicability.

#### 14.3.8 *Convention on Mutual Administrative Assistance in Tax Matters*

The Convention on Mutual Administrative Assistance in Tax Matters<sup>99</sup> is a joint effort by the Council of Europe and the Member countries of the Organization for Economic Cooperation and Development (OECD) that arranges for information exchange and assistance in the recovery and service of documents (Article 1 paragraph 2). In 2010 a

91 Explanatory report on the Convention under 49, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

92 Explanatory report on the Convention under 50, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

93 Explanatory report on the Convention under 59-62, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

94 Explanatory report on the Convention under 59-62, via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

95 Article 19 paragraph 2 of the Convention and Explanatory report on the Convention under 59-62 via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

96 Article 19 paragraph 3 of the Convention and Explanatory report on the Convention under 59-62 via: <http://conventions.coe.int/Treaty/en/Reports/Html/100.htm>.

97 Namely Azerbaijan, Belgium, Germany, Italy, Luxembourg and Portugal. <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=100&CM=1&DF=&CL=ENG>.

98 Klip & Vervaele 2002, p. 9.

99 Joint Council Of Europe/OECD Convention On Mutual Administrative Assistance In Tax Matters, Strasbourg, 25 January 1988. <http://www.oecd.org/ctp/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm>.

Protocol was drawn up amending the substance of the Convention. Relevant for this report is that Article 4's scope was broadened.<sup>100</sup> The article describes the circumstances under which information can be exchanged:

The Parties shall exchange any information, in particular as provided in this section, that is foreseeably relevant for the administration or enforcement of their domestic laws concerning the taxes covered by this Convention.

According to the Explanatory Note, the article's meaning is broad, which implies that it should help the Contracting Parties battle international tax avoidance and evasion to the widest possible extent.<sup>101</sup> However, it is not so broad that it supports 'fishing expeditions'<sup>102</sup> or requests for information irrelevant to tax affairs.<sup>103</sup>

The Convention gives a non-exhaustive list of five available information-exchange methods:<sup>104</sup>

- exchange upon request (Article 5);<sup>105</sup>
- automatic exchange (systematic sending of information) (Article 6);<sup>106</sup>
- spontaneous exchange (Article 7);<sup>107</sup>
- simultaneous tax examination (Article 8);<sup>108</sup>
- tax examination abroad (Article 9).<sup>109</sup>

The competent authorities for the exchange of information are determined by each state and its national laws separately in Annex B to the Convention.<sup>110</sup> As the Explanatory Note

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100 See for a description on the old provision: Van Daele et al. 2010, p. 435-436.

101 Text of the revised explanatory report to the Convention on mutual administrative assistance in tax matters as amended by protocol, p. 9, via [www.oecd.org](http://www.oecd.org).

102 These are requests by authorities which do not concern a particular issue, which could involve a violation of Article 6 ECHR. See *Funke vs. France*, 25 February 1993, application number 10828/84.

103 Text of the revised explanatory report to the Convention on mutual administrative assistance in tax matters as amended by protocol, via [www.oecd.org](http://www.oecd.org).

104 Text of the revised explanatory report to the Convention on mutual administrative assistance in tax matters as amended by protocol, p. 9, via [www.oecd.org](http://www.oecd.org).

105 Text of the revised explanatory report to the Convention on mutual administrative assistance in tax matters as amended by protocol, p. 10-11, via [www.oecd.org](http://www.oecd.org).

106 Text of the revised explanatory report to the Convention on mutual administrative assistance in tax matters as amended by protocol, p. 11-12, via [www.oecd.org](http://www.oecd.org).

107 Text of the revised explanatory report to the Convention on mutual administrative assistance in tax matters as amended by protocol, p. 12, via [www.oecd.org](http://www.oecd.org).

108 Text of the revised explanatory report to the Convention on mutual administrative assistance in tax matters as amended by protocol, p. 12-13, via [www.oecd.org](http://www.oecd.org).

109 Text of the revised explanatory report to the Convention on mutual administrative assistance in tax matters as amended by protocol, p. 14-15, via [www.oecd.org](http://www.oecd.org).

110 For a full list see: <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=127&CV=1&NA=&PO=999&CN=999&VL=1&CM=9&CL=ENG>.



conveys, there are too many differences between states to create a uniform authority in each country.<sup>111</sup> Article 21 under paragraph 4 regulates which types of information can be exchanged. There are no specific restrictions concerning personal data.<sup>112</sup> In total, 22 states have ratified this Convention, twelve of which belong to the European Union.<sup>113</sup>

From the above, it can be concluded that for specific cases in which an administrative approach is applied, information can be exchanged on the basis of this Convention; there must be a link with tax evasion or avoidance, however.

#### 14.3.9 *Legal provisions regarding the exchange of information on fiscal matters*

The TFEU does not regulate the exchange of information between tax authorities. The existing articles in the TFEU on tax and fiscal matters address the flow of goods in the internal market.<sup>114</sup> Articles 28-30 TFEU deal with protectionism via fiscal measures, whereas Articles 110 to 113 TFEU deal with discriminatory taxes upon imported goods.<sup>115</sup>

The OECD provides model agreements for the exchange of information on tax matters, developed by the OECD Global Forum Working Group on Effective Exchange of Information.<sup>116</sup> Many countries both within and outside the EU have ratified such bilateral agreements,<sup>117</sup> but they do not seem to include bilateral agreements focusing specifically on information exchange between EU Member States. The OECD does provide a full overview of the general agreements that various jurisdictions, both European and global, have made for tax purposes.<sup>118</sup> It is clear that these agreements are bilateral and include provisions on information exchange between the Contracting Parties.

For example, the agreement between the Netherlands and Belgium on taxation<sup>119</sup> includes a provision on information exchange in Article 29. This provision is broad; it covers any information relevant to the execution of the provisions of the agreement. Moreover, the information exchange is not limited to inhabitants of the contracting parties

111 Text of the revised explanatory report to the Convention on mutual administrative assistance in tax matters as amended by protocol, p. 8, via [www.oecd.org](http://www.oecd.org).

112 Text of the revised explanatory report to the Convention on mutual administrative assistance in tax matters as amended by protocol, p. 34-35, via [www.oecd.org](http://www.oecd.org).

113 [http://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf).

114 Craig & De Burca 2011, p. 611ff.

115 Craig & De Burca 2011, p. 611ff.

116 [www.oecd.org](http://www.oecd.org).

117 [www.oecd.org](http://www.oecd.org).

118 [www.oecd.org](http://www.oecd.org).

119 *Verdrag tussen het Koninkrijk der Nederlanden en het Koninkrijk België tot het vermijden van dubbele belasting en tot het voorkomen van het ontgaan van belasting inzake belastingen naar inkomen en naar het vermogen, met Protocollen, Luxemburg, 5 juni 2001.*

only. This means that information on persons who are not inhabitants of either Belgium and/or the Netherlands can still be exchanged under the agreement.

It goes beyond the scope of this report to discuss all the relevant bilateral agreements on tax matters and the relevant exchange of information. Readers should consult the OECD database to review the relevant agreements and provisions.<sup>120</sup>

**Table 14.1 Overview of instruments for information exchange**

Legal instruments for information exchange	Legal basis for information exchange	Information exchange supporting an administrative approach?
Schengen Convention 1990	Articles 39 (on request) and 46 (spontaneous)	Yes, both for information exchange on request and spontaneous exchange, but with prior consent from the requested contracting party.
EU Convention on Mutual Assistance in Criminal Matters	Articles 3 (on request) and 7 (spontaneous)	Yes, but only on a limited scale under Article 3. Spontaneous information exchange under Article 7 is impossible. Article 23 stipulates that forwarding information <i>outside</i> the scope of the convention <i>after</i> initial information exchange is possible with the prior consent of the communicating Member State.
The Swedish Initiative	Article 3 (upon request) and 7 (spontaneous)	Two options (1) an administrative approach falls under the definition of 'criminal intelligence operation' for screening the backgrounds of applicants for administrative grants, subsidies etc. (2) forwarding information already exchanged (on request or spontaneously) is permitted outside the scope of the Swedish Initiative with the prior consent of the communicating state.
Prüm Convention / Prüm Decision	Articles 13 (non-personal data) 14 (personal data) Prüm Convention, 27 Prüm Convention, 35 paragraph 1 Prüm Convention respectively Article 26 paragraph 1 Prüm Decision	Yes, under the following criteria of Article 35 Prüm Convention, resp. 26 Prüm Decision: (1) the administering Contracting Party must give prior authorization; (2) the national law of the receiving Contracting Party must allow the use of personal data in support of an administrative approach and (3) use of personal data is permitted by the national laws of the administering Contracting Party.

<sup>120</sup> www.oecd.org.

Legal instruments for information exchange	Legal basis for information exchange	Information exchange supporting an administrative approach?
Naples II Convention	Articles 10 (on request) and 17 (spontaneous)	Yes. Exchange of personal data is limited to the purposes of the Naples II Convention as summed up in Article 1. Forwarding of information for other purposes is possible with the prior consent of the communicating state.
The European Convention on the Service Abroad of Documents relating to Administrative Matters	Article 6	n.a.
European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters	Article 14 and 19	n.a.
Convention on Mutual Administrative Assistance in Tax Matters	Articles 4 to 9, 21	Yes, if there is a link with tax evasion or avoidance.

#### 14.4 APPLICABILITY OF EXISTING INSTRUMENTS ON INFORMATION EXCHANGE IN THE EU MEMBER STATES – THE ORGANIZATIONAL FRAMEWORK

The legal instruments providing for information exchange also provide for an organizational framework for the information exchange itself. We discuss this structure below. First, we consider the structure in which Europol and Eurojust can exchange and share information in the context of criminal investigations. Even though this structure is currently limited to information exchange related to criminal investigations, we explore the possibility of using that information structure for an administrative approach (Sections 14.2.3.1 and 14.2.3.2). Second, we look at the structure for information exchange under the Schengen Convention and the Naples Convention (Sections 14.2.3.3 and 14.2.3.4 respectively). Europol and Eurojust can also make use of this information structure. We also discuss the information exchange structure as regulated for specific topics (Section 14.2.3.5). Last, we consider the structure regulated by the Swedish Initiative and the Interpol Bureaux as other possible channels for exchanging information (Section 14.2.3.6).

##### 14.4.1 *Potential for sharing information under the Europol Council Decision*<sup>121</sup>

Article 88 TFEU defines Europol's mission:

<sup>121</sup> Brussels 7 December 2012, COM (2012) 735, p. 4.

Europol's mission shall be to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.

Paragraph 2 of Article 88 continues by listing Europol's tasks, which include (1) the collecting, processing, storage analysis and exchange of information, in particular information forwarded by Member States or third countries or bodies and (2) the coordination, organization and implementation of investigative and operational action carried out jointly by Member State's law enforcement authorities or in the context of Joint Investigation Teams (JITs).

According to Article 4 of the Council Decision of 6 April 2009 establishing the European Police Office (Europol),<sup>122</sup> Europol has been mandated to support national law enforcement authorities in the areas of organized crime, terrorism and other forms of serious crime, as summed up in the Annex to the Europol Council Decision. One of Europol's core tasks is to serve as a platform to collect, store, process, analyse and exchange information and intelligence.<sup>123</sup> Article 8 of the Europol Council Decision establishes a system of **Europol National Units** (ENUs). The ENUs are found in each Member State and connect the national law enforcement authorities and Europol.<sup>124</sup> They form the link for information exchange to and from Europol. Conversely, at Europol, at least one liaison officer from each ENU is assigned to represent the interests of its Member State within Europol.<sup>125</sup> The liaison officers are in place to exchange information to and from Europol and the liaison officer's national ENU.<sup>126</sup>

To communicate information to and from Europol, the ENU and liaison officers present at Europol work via the Secure Information Exchange Network Application (**SIENA**). This IT network is operational 24/7.<sup>127</sup> ENUs can also communicate directly with Europol, without contacting their national liaison officers at Europol.<sup>128</sup> Moreover, in the 27 Member States, not only the ENUs but also designated national authorities have access to SIENA as well as third-country partners.<sup>129</sup> Europol can use the information in SIENA if authorized

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122 2009/371/JHA. Hereafter: Europol Council Decision.

123 Article 5 paragraph 1 under a of the Council Decision of 6 April 2009 establishing the European Police Office (Europol); Brussels 7 December 2012, COM (2012) 735, p. 5; Deflem 2006, p. 340.

124 Article 8 paragraph 2 and 4 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

125 Article 9 paragraph 2 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

126 Article 9 paragraph 3 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

127 Drewer & Ellerman 2012, p. 385-386.

128 Brussels 7 December 2012, COM (2012) 735, p. 5-6.

129 Drewer & Ellerman 2012, p. 385-386. See <https://www.europol.europa.eu/content/page/external-cooperation-31> for an overview of the non-EU states with which Europol has both operational and strategic agreements.

by the inputting party. Control over the data is retained by the handling codes used by the Member States and third parties.<sup>130</sup>

To share and retrieve information, Europol, the ENUs and the liaison officers use the **Europol Information System (EIS)**.<sup>131</sup> The information in EIS may only be processed in accordance with the tasks assigned to Europol under Article 12 paragraph 1 of the Europol Council Decision, and may relate to:<sup>132</sup>

- persons suspected or convicted of criminal offences for which Europol is competent;
- persons for whom there are factual indications or reasonable grounds leading to the belief that they will commit an offence within the competence of Europol.

The personal data resulting from these two categories may include the person's name, aliases or assumed names, data and place of birth, nationality, sex, place of residence, profession and the person's whereabouts, social security numbers, driving licences, identification documents and passport data and other characteristics which will assist in identifying the person.<sup>133</sup> Moreover, particulars such as actual or alleged criminal offences, the means that were or may have been used to commit those offences, and information on legal persons, the departments handling the cases and filing references, suspected membership of a criminal organization, and convictions within the competence of Europol and the party inputting the above particulars.<sup>134</sup> Furthermore, additional information relating to the person as mentioned in Article 12 paragraph 1 may be exchanged between Europol and the ENUs upon request.<sup>135</sup>

The data protection framework to which Europol must adhere is regulated by the principles of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 and of Recommendation No R (87) 15 of the Committee of Ministers of the Council of Europe of 17 September 1987.<sup>136</sup> It is both a reflection of Directive 95/46/EC and tailor-made to the specific tasks and mandate imposed on Europol.<sup>137</sup> The specific data protection regulations relate to the

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See also Article 23 Council Decision of 6 April 2009 establishing the European Police Office (Europol). A detailed discussion of these arrangements falls outside the scope of this report.

130 Drewer & Ellerman 2012, p. 386.

131 Article 11 Council Decision of 6 April 2009 establishing the European Police Office (Europol). Drewer & Ellerman 2012, p. 387.

132 Article 12 paragraph 1 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

133 Article 12 paragraph 2 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

134 Article 12 paragraph 3 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

135 Article 12 paragraph 4 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

136 Article 27 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

137 Drewer & Ellerman 2012, p. 383.

Analysis Work Files (AWFs),<sup>138</sup> the rules governing Europol's relations with partners,<sup>139</sup> rules concerning the confidentiality of Europol information<sup>140</sup> and rules regarding the processing of data by Europol related to its tasks.<sup>141</sup> Also, Article 12 paragraph 5 entails particular data protection concerning persons who are acquitted or whose case has been definitely dropped; the data must be deleted in such instances. Data protection is supervised by the Data Protection Officer,<sup>142</sup> who is a member of staff tasked with ensuring compliance with the provisions of the Europol Council Decision, and the Joint Supervisory Body, an independent entity consisting of data protection authorities from the 27 Member States.<sup>143</sup>

Access to EIS data is arranged in Article 13 of the Europol Council Decision. ENUs, national liaison officers at Europol, the directors and deputy directors, and authorized staff may input information into EIS as well as retrieve information from it.<sup>144</sup> Only the inputting party can modify, correct or delete data.<sup>145</sup> If personal data has been entered, other parties can add additional data as well.<sup>146</sup> Responsibility for the retrieval, modification or input of data lies with the retrieving, modifying or inputting party respectively. The party must be identifiable.<sup>147</sup> Communications between ENUs and the national authorities is arranged under national law.<sup>148</sup> Competent national authorities can also access EIS; the *Official Journal of the European Union* reports which authorities are competent.<sup>149</sup> However, these authorities can only see whether the information they request is present in EIS, not the actual content of that information. Further enquiries regarding the content run via the ENUs.<sup>150</sup> If information on crime in a Member State or criminal connections to that Member State falling within the Europol mandate becomes available, Europol has a duty to inform the ENU of that particular Member State.<sup>151</sup> At an ENU's request, the Europol

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138 Council Decision of 30 November 2009 adopting and implementing rules for Europol analysis work files (2009/936/JHA).

139 Council Decision of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information (2009/934/JHA).

140 Council Decision of 30 November 2009 adopting the rules on the confidentiality of Europol information (2009/968/JHA).

141 Decision of the Management Board of Europol of 4 June 2009 on the conditions related to the processing of data on the basis of Article 10 paragraph 4 of the Europol Decision, OJ L 348/1, 29/12/2009.

142 Article 28 Council Decision of 6 April 2009 establishing the European Police Office (Europol); Drewer & Ellerman 2012, p. 384.

143 Article 34 Council Decision of 6 April 2009 establishing the European Police Office (Europol); Drewer & Ellerman 2012, p. 385.

144 Article 13 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

145 Article 13 paragraph 2 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

146 Article 13 paragraph 3 and 4 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

147 Article 13 paragraph 5 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

148 Article 13 paragraph 5 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

149 Article 13 paragraph 7 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

150 Article 13 paragraph 6 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

151 Article 17 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

liaison officers can be informed.<sup>152</sup> Information related to other forms of serious crime may also be communicated.<sup>153</sup> Europol can store, modify and use EIS data for the Analysis Work Files (AWFs).<sup>154</sup> The AWFs fall outside the scope of this report, due to the nature of the aim for which they are meant, i.e. criminal investigations.<sup>155</sup>

In conclusion, the exchange of information with Member States can only take place within the legal mandate of Europol, i.e. serious and organized crime. Information exchange relating to an administrative approach is therefore not directly possible.

In addition to Member States, Europol may also exchange information with third parties. According to Article 22 paragraph 1 and 2 of the Europol Council Decision, Europol has concluded agreements with Eurojust, OLAF, FRONTEX, CEPOL, and the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), all European Union agencies. Both operational and strategic agreements may be concluded.<sup>156</sup> Operational agreements include the exchange of personal information, whereas this is ruled out for strategic agreements.<sup>157</sup> Europol currently has an operational agreement with Eurojust<sup>158</sup> that mainly concerns the establishment, support for and training of Joint Investigation Teams (JITs), as well as monthly staff exchanges. Strategic agreements have been made with OLAF, the EMCDDA, CEPOL, FRONTEX, and the European Centre for Disease Prevention and Control.<sup>159</sup> Other strategic agreements have been made with European Union institutions, namely the European Union itself and the ECB.<sup>160</sup> Europol can only transmit data from a Member State to the agencies and institutions of the European Union<sup>161</sup> as well as third states and organizations<sup>162</sup> after prior consent has been obtained from that Member State.<sup>163</sup> If the transmitting entity is not a Member State, then before transmitting data to a third party as defined under Article 22 and 23 of the Europol Council Decision, Europol must review whether that data could obstruct the proper performance of a Member State's tasks and jeopardize security, public order or the general welfare of a

152 Article 17 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

153 Article 17 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

154 Article 14-17 paragraph 6 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

155 See for example Drewer & Ellerman 2012, p. 387ff.

156 de Hert & de Schutter 2008, p. 319.

157 See Article 1 under e and f of the Council Decision of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information; de Hert & de Schutter 2008, p. 319.

158 <https://www.europol.europa.eu/content/page/eu-agencies-135>.

159 <https://www.europol.europa.eu/content/page/eu-agencies-135>.

160 <https://www.europol.europa.eu/content/page/eu-institutions-133>.

161 Regulated by Article 22 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

162 Regulated by Article 23 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

A detailed discussion of these arrangements fall outside the scope of this report.

163 Article 24 paragraph 1 Council Decision of 6 April 2009 establishing the European Police Office (Europol). See also Article 9 Council Decision of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information.

Member State.<sup>164</sup> Europol is responsible for the transmission of such data and keeps records of all transmissions under Article 24 of the Europol Council Decision.<sup>165</sup> The recipients of the data must also guarantee that the data will be used only for the purpose for which it was transmitted.<sup>166</sup> Onward transmission of personal data is only possible when the EU body guarantees that the transmission is limited to competent authorities and takes place under the same conditions as the original transmission.<sup>167</sup> The EU body, with which Europol has an operational agreement, may not communicate the personal data to other EU bodies or third parties, except if Europol has given prior consent or if the transmission is absolutely necessary to safeguard the essential interests of the relevant Member States within the scope of Europol's objectives, or if transmission would prevent imminent danger associated with crime or terrorist offences.<sup>168</sup> Such a transmission may not take place without consent of the Member State concerned.<sup>169</sup>

The implication of the above is that, when personal information is transferred to EU bodies, even in exceptional circumstances, Europol's mandate must be respected. This means that information exchange with EU bodies in support of an administrative approach is currently not possible.

Recently, the Commission has adopted a Europol Regulation proposal that now lies before the Council and the European Parliament.<sup>170</sup> The Europol Council Decision and Council Decision 2005/681/JHA (establishing CEPOL, the European Police College) will consequently be repealed. The proposed regulation aims to combine CEPOL and Europol, which would ideally generate synergies between operational police know-how and police training.<sup>171</sup> The new institution ought to be more effective at collecting and analysing information and sharing those analyses.<sup>172</sup> The proposal seeks to impose a heavier obligation on Member States to supply Europol with information.<sup>173</sup> The proposal does not aim to broaden the definition of the authorities with which Europol is meant to cooperate:

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164 Article 24 paragraph 1 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

165 See also Article 10 Council Decision of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information.

166 Article 24 paragraph 2 Council Decision of 6 April 2009 establishing the European Police Office (Europol).

167 Article 17 paragraph 3 Council Decision of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information.

168 Article 18 Council Decision of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information.

169 Article 18 Council Decision of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information.

170 Brussels 27 March 2013 COM (2013) 173.

171 Brussels 27 March 2013 COM (2013) 173, p. 4.

172 Brussels 27 March 2013 COM (2013) 173, p. 5-6.

173 Brussels 27 March 2013 COM (2013) 173, p. 6-7.



[...] the competent authorities of the Member States means all police authorities and other law enforcement services existing in the Member States which are responsible under national law for preventing and combating criminal offences.<sup>174</sup>

The category law enforcement officers is defined as:

[...] law enforcement officers means officers of police, customs and of other relevant services, including Union bodies, responsible for preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime that affect a common interest covered by a Union policy and for civilian crisis management and international policing of major events.<sup>175</sup>

It would be difficult to fit administrative authorities under these two definitions, although 'other relevant services' could be interpreted broadly. However, the forms of crime for which the authorities need to be responsible must fall within the framework of serious or organized crime concerning two or more Member States, terrorism, forms of crime reflected in a Union policy, civilian crisis management and international policing of major events. None of the above seem to translate directly to authorities mainly concerned with administrative measures.<sup>176</sup>

Finally, Europol has hosted the European Cybercrime Centre (EC3) since 1 January 2013. While currently still under development,<sup>177</sup> the European Commission established the EC3<sup>178</sup> to serve as an information focal point where public, private and open source data is used to enrich police data.<sup>179</sup> This will involve establishing a 'Data Fusion Centre'.<sup>180</sup>

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174 Brussels 27 March 2013 COM (2013) 173, p. 20 (proposed Article 2 under a).

175 Brussels 27 March 2013 COM (2013) 173, p. 20 (proposed Article 2 under d).

176 The proposal defines 'administrative personal data' as well. However, this is not personal data related to administrative measures to prevent crime, but instead means personal data concerning Europol's own administration; personal data under the auspices of the objectives of Europol (proposed Article 3 paragraph 1 and 2) are specifically excluded from this definition of administrative personal data. See Brussels 27 March 2013 COM (2013) 173, p. 20 (proposed Article 2 under o), p. 47 (proposed Article 44 paragraph 8) and 50 (proposed Article 48).

177 Communication from the Commission to the Council and the European Parliament of 28 March 2012, Tackling crime in our digital age: establishing a European Cybercrime Centre, COM (2012) 140, p. 8; <https://www.europol.europa.eu/ec3>.

178 Communication from the Commission to the Council and the European Parliament of 28 March 2012, Tackling crime in our digital age: establishing a European Cybercrime Centre, COM (2012) 140; The EU Internal Security Strategy in action: five steps towards a more secure Europe, COM (2010) 67 of 22 November 2010.

179 Communication from the Commission to the Council and the European Parliament of 28 March 2012, Tackling crime in our digital age: establishing a European Cybercrime Centre, COM (2012) 140, p. 4 and 7.

180 <https://www.europol.europa.eu/ec3/services>.

The information concerned relates to cybercrime activity, methods and suspects.<sup>181</sup> The Data Fusion Centre will connect law enforcement authorities, CERTs and private actors.<sup>182</sup> Since the EC3 is located within Europol, it can make use of Europol's information structure.<sup>183</sup> Moreover, an EC3 Programme Board has been established, including such stakeholders as Eurojust, CEPOL, the Member States as represented by the EU Cybercrime Taskforce, ENISA and the Commission.<sup>184</sup> These organizations are also involved in the EC3 operationally.<sup>185</sup>

In conclusion, information exchange under the Europol framework can only take place when the information concerns criminal investigations within the mandate of Europol, i.e. serious and organized crime. The network structure offered by the ENUs and liaison officers at Europol as well as the IT structure offered by EIS therefore may not be used for information exchange in the scope of an administrative approach. However, the current structure of information exchange would constitute a point of departure for a future information structure supporting an administrative approach.

#### 14.4.2 *The information exchange structure under Eurojust*

Article 85 of the TFEU defines the mission of Eurojust:

Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.

Furthermore, Article 85 determines Eurojust's tasks, which include (a) the proposed initiation of criminal investigations, particularly those related to offences against the financial interests of the EU; (b) the coordination of investigations and prosecutions referred to in (a), and (c) the strengthening of judicial cooperation, including conflict resolution concerning jurisdiction and close cooperation with the European Judicial Network.

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181 Communication from the Commission to the Council and the European Parliament of 28 March 2012, Tackling crime in our digital age: establishing a European Cybercrime Centre, COM (2012) 140, p. 4.

182 <https://www.europol.europa.eu/ec3/services>.

183 <https://www.europol.europa.eu/ec3>.

184 Communication from the Commission to the Council and the European Parliament of 28 March 2012, Tackling crime in our digital age: establishing a European Cybercrime Centre, COM (2012) 140, p. 6. For a full list: <https://www.europol.europa.eu/ec/ec3-board>.

185 Communication from the Commission to the Council and the European Parliament of 28 March 2012, Tackling crime in our digital age: establishing a European Cybercrime Centre, COM (2012) 140, p. 7.

The objective, competence and tasks of Eurojust are specified in Articles 3, 4 and 5 of the Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.<sup>186</sup> The general competence of Eurojust concerns those types of crimes and offences for which Europol is competent to act, as well as other offences committed in concurrence with these offences.<sup>187</sup> In other cases, Eurojust may assist investigations and prosecutions when a Member State so requests.<sup>188</sup> Eurojust's objectives are to stimulate and improve coordination between competent authorities of Member States in investigations and prosecutions, to improve cooperation between the competent authorities of Member States, particularly in facilitating judicial requests for cooperation, and to support the competent authorities of Member States otherwise in order to render their investigations and prosecutions more effective.<sup>189</sup> The previous objectives may be executed in the context of the criminal behaviour for which Eurojust is competent, as specified above, when two or more Member States and investigations and prosecutions are involved.<sup>190</sup> Assistance is also possible for cooperation between a Member State and a non-Member State if a competent authority of that Member State so requests.<sup>191</sup> Eurojust may also assist a single Member State or competent authority of the Commission, again upon request.<sup>192</sup> Eurojust's tasks are either fulfilled by the network of national members or by the Eurojust College.<sup>193</sup>

Eurojust acts either through its 27 national members<sup>194</sup> or through its College.<sup>195</sup> The College is made up of all of the national members.<sup>196</sup> Delegated national members have a seat on Eurojust,<sup>197</sup> act under and are subject to their national legislation,<sup>198</sup> and are either prosecutors, judges or police officers of equivalent competence.<sup>199</sup> Information exchange between Eurojust and the Member States is directed via the national members.<sup>200</sup> Furthermore, under the Eurojust Council Decision, the national member may contact the competent authorities of his own Member State directly.<sup>201</sup>

186 Hereafter: Eurojust Council Decision. Brussels 15 July 2009, 5347/3/09, consolidated version.

187 Article 4 paragraph 1 Eurojust Council Decision.

188 Article 4 paragraph 2 Eurojust Council Decision.

189 Article 3 paragraph 1 Eurojust Council Decision.

190 Article 3 paragraph 1 Eurojust Council Decision.

191 Article 3 paragraph 2 Eurojust Council Decision.

192 Article 3 paragraph 3 Eurojust Council Decision.

193 Article 5 Eurojust Council Decision.

194 Article 6 Eurojust Council Decision; Suominen 2008, p. 222.

195 Article 7 Eurojust Council Decision.

196 Article 10 paragraph 1 Eurojust Council Decision.

197 Article 2 paragraph 2 Eurojust Council Decision.

198 Article 2 paragraph 4 Eurojust Council Decision.

199 Article 2 paragraph 1 Eurojust Council Decision.

200 Article 9 paragraph 2 Eurojust Council Decision.

201 Article 9 paragraph 4 Eurojust Council Decision.

The designation of powers to national members and the access to their Member State's information is arranged under the Decision. National members are in any case authorized to access the following types of registers in their Member State: criminal records, registers of arrested persons, investigations registers, DNA registers and other registers of their Member State where they deem this information necessary to fulfil their tasks.<sup>202</sup> The Member States must define beforehand which additional powers are granted to their national members as well as the national member's right to act in relation to foreign judicial authorities.<sup>203</sup>

Article 9a paragraph 1 determines the scope of the powers under Articles 9b to 9f; the national member exercises his powers in his capacity as a competent national authority, acting in accordance with the national law (of his Member State) and in accordance with the conditions of Article 9b to 9e.<sup>204</sup> He shall, when appropriate, make it known whenever he is exercising these powers.<sup>205</sup>

Information exchange with the national level takes place via national correspondents who are responsible for the Eurojust National Coordination System (ENCS).<sup>206</sup> The ENCS facilitates the input of information into the Case Management System (CMS) at the level of Eurojust, assists in determining whether a case requires the assistance of Eurojust or the European Judicial Network (EJN), assists the national member in identifying relevant authorities for the execution of requests for judicial cooperation, and maintains relations with the ENUs of Europol.<sup>207</sup> To meet these objectives, the national correspondents are<sup>208</sup> connected to the CMS,<sup>209</sup> but their access is restricted to the index and temporary work files created by their national member.<sup>210</sup> The extent to which the national correspondents have access to the index at the national level is further determined by the Member States themselves.<sup>211</sup>

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202 Article 9 paragraph 3 Eurojust Council Decision.

203 Article 9a paragraph 2 and 4 Eurojust Council Decision.

204 Article 9a paragraph 1 Eurojust Council Decision.

205 Article 9a paragraph 1 Eurojust Council Decision.

206 Article 12 paragraph 1, 2 and 4 Eurojust Council Decision. Paragraph 2 of Article 12 assigns four types of national correspondents, namely: (a) national correspondents for Eurojust, (b) national correspondents for Eurojust for terrorism matters, (c) national correspondents and contact points for the European Judicial Network and (d) national members or contact points for the Network of Joint Investigation Teams and Council Decisions 2002/494/JHA, 2007/845/JHA and 2008/852/JHA.

207 Article 12 paragraph 5 and 16 Eurojust Council Decision.

208 In the case of the national members or contact points for the Network of Joint Investigation Teams and Council Decisions 2002/494/JHA, 2007/845/JHA and 2008/852/JHA, they *may* be connected.

209 Article 12 paragraph 6 Eurojust Council Decision. The CMS is established to support Eurojust in assisting investigations and prosecutions, particularly by cross-referencing information, facilitate access to information on ongoing investigations and prosecutions and facilitate the lawfulness and compliance with the rules on personal data processing according to the Eurojust Council Decision. See Article 16 to 16b Eurojust Council Decision.

210 Article 16 paragraph 1 and 16b paragraph 2 Eurojust Council Decision.

211 Article 16b paragraph 3 Eurojust Council Decision.

Information exchange is furthermore possible without the prior authorization of the national members themselves or their Member State's competent authorities if such exchange is necessary for the performance of Eurojust's tasks.<sup>212</sup> National members will be informed promptly of any case concerning them.<sup>213</sup> Member State's competent authorities exchange information necessary for Eurojust's tasks, as determined by Articles 4 and 5 and the rules on data protection of the Eurojust Council Decision, via their national members.<sup>214</sup>

The data protection rules for the exchange of information as arranged under the Eurojust Council Decision are laid down in Articles 14, 15, 17, 18 to 25 and Article 27. Here, we discuss only those rules important for this report. Article 14 determines that Eurojust may process personal data when necessary to attain its objectives and within the framework of its competences and tasks.<sup>215</sup> Article 15 paragraph 1 determines that Eurojust may only process personal data on persons who are suspected of, or have committed, or have taken part in or have been convicted of criminal offences under the national legislation of Member States for which Eurojust is competent. Paragraph 2 determines the same for witnesses or victims. In exceptional cases and under certain strict conditions, other personal data relating to the circumstances of an offence may be processed.<sup>216</sup> Personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union memberships and state of health or sexual orientation may only be processed by Eurojust if this is necessary for national investigations and for coordination within Eurojust.<sup>217</sup> Such information may not be included in the index of the CMS.<sup>218</sup> A Data Protection Officer will be informed of the processing of such information as well as of the exceptional cases as named above.<sup>219</sup> To further enhance Eurojust's data protection regime, a Joint Supervisory Body has been established to ensure compliance with the Decision.<sup>220</sup>

Regarding contact with third parties, Eurojust has a special relationship with the European Judicial Network (EJN). The national members of Eurojust supply information to the EJN contact points on a case-by-case basis when it is thought that the EJN is better suited to deal with a case. Contact with the European Union's institutions, agencies and bodies is arranged in Article 26 of the Eurojust Council Decision, and relations with third states and organizations are arranged in Article 26a. In order to exchange information with those entities, Article 27 stipulates that a national member must give consent prior

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212 Article 13 paragraph 3 Eurojust Council Decision.

213 Article 13 paragraph 3 Eurojust Council Decision.

214 Article 13 paragraph 1 Eurojust Council Decision.

215 Article 14 paragraph 1, 2 and 3 Eurojust Council Decision.

216 Article 15 paragraph 3 Eurojust Council Decision.

217 Article 15 paragraph 4 Eurojust Council Decision.

218 Article 15 paragraph 4 Eurojust Council Decision.

219 Article 17 and 15 paragraph 3 and 4 Eurojust Council Decision.

220 Article 23 Eurojust Council Decision.

to the transfer of information. When appropriate, he consults his Member State's competent authorities. The data can only be used for the purpose for which it was transmitted. However, no restrictions on the purposes are mentioned.<sup>221</sup>

In conclusion, information exchange under the regime of the Eurojust Council Decision can only take place if it does not exceed the restrictions placed on Eurojust's objectives and tasks. These are limited to criminal investigations and prosecutions, with no option to forward information for other purposes. The situation regarding information exchange with third parties is peculiar. Apparently, information can be exchanged for 'purposes', but these purposes are not specified further. Crime prevention by means of an administrative approach could thus be considered a 'purpose'. Information exchange in support of an administrative approach is therefore not possible within the EU, but it may be possible with third parties. Even though Eurojust's information exchange structure is directed – primarily and exclusively – at criminal investigations and prosecutions, the structure could provide a basis for judicial authorities to begin exchanging information in support of an administrative approach to crime. However, this would mean that the scope for which the structure has been established must be extended to include an administrative approach to crime.

#### 14.4.3 *The information exchange structure under the Schengen Convention*

The exchange of data under the Schengen Convention regime is arranged through a number of different instruments. According to the Commission's 2010 Overview of Communications, these were introduced to enhance operations within the Schengen area as well as to enhance the operation of the customs union.<sup>222</sup> First of all, Title IV of the Schengen Convention introduced **the Schengen Information System (SIS)**. This is a centralized information system that also has a national section in each Contracting State. Within the SIS, the Contracting Parties issue alerts regarding various topics. The **SIS II** system came into force on 9 April 2013.<sup>223</sup> This second-generation IT system has improved the SIS in several ways, for example by creating the possibility of linking alerts, introducing new categories of alerts, and making it possible to store fingerprints, photographs and copies of European Arrest Warrants (EAW).<sup>224</sup> All EU Member States, and some third-party states participate in SIS II.<sup>225</sup>

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221 Article 27 paragraph 2 Eurojust Council Decision.

222 COM (2010) 385, p. 5.

223 Council Decision 2007/533/JHA; [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/index_en.htm); [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/20130409\\_01\\_en.htm#/\\_](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/20130409_01_en.htm#/_).

224 COM (2010)385, p. 5.

225 COM (2010)385, p. 5. For the third-party provisions, see Regulation (EC) NO 1987/2006.

SIS II consists of three parts, namely (1) a central system, located in Strasbourg, which includes a technical support function and a uniform national interface; (2) a national system, which allows each Member State to communicate with the central system and (3) a communication infrastructure between the central and national systems.<sup>226</sup> Data can be entered, updated, searched and deleted via the national systems, but Member States cannot search directly in one another's national systems;<sup>227</sup> they can search the SIS II central system, however.<sup>228</sup> Article 46 paragraph 6 of Council Decision 2007/533/JHA specifically states that the data may not be used for administrative purposes. SIS II works as follows. When a Contracting Party searches in SIS, a 'hit' is produced when the search data matches an existing alert in SIS. In that case, the authorities may go through the **SIRENE Bureaux**<sup>229</sup> to request supplementary information from the Contracting Party that issued the alert making use of the SIS II communication network.<sup>230</sup>

The data categories included in the SIS II concern persons about whom an alert has been issued<sup>231</sup> and objects.<sup>232</sup> Under certain conditions, both Europol and Eurojust can access the SIS II database.<sup>233</sup> The data on persons and objects can only be processed in accordance with the purposes specified under the Convention.<sup>234</sup>

For the purposes of data protection, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 is applicable.<sup>235</sup>

In technical terms, it should be noted that SIS II uses the Secure Trans-European Services for Telematics between Administrations (s-TESTA).<sup>236</sup>

Other structures that play a role in the Schengen Area are the following. First of all, **EURODAC** is an automated, centralized fingerprint identification system which encompasses the fingerprint data of certain third-country nationals.<sup>237</sup> Its goal is to determine which EU Member State is responsible for examination of asylum applications under the

226 Article 4 paragraph 1 of the Council Decision 200/533/JHA.

227 Article 4 paragraph 2 of the Council Decision 200/533/JHA.

228 Article 4 paragraph 4 of the Council Decision 200/533/JHA.

229 Supplementary Information Request at the National Entry.

230 Brussels 7 December 2012, COM (2012) 735, p. 5.

231 When an EAW is lodged against a person or a person is wanted for arrest for extradition purposes (Chapter V Council Decision 2007/533/JHA), a person is missing (Chapter VI Council Decision 2007/533/JHA) or the person is sought to assist with a judicial procedure (Chapter VII Council Decision 2007/533/JHA).

232 When an object is sought for seizure, or to use as evidence in a criminal procedure (Chapter IX Council Decision 2007/533/JHA).

233 Article 41-43 Council Decision 2007/533/JHA.

234 Article 46 Council Decision 2007/533/JHA.

235 Articles 56 and 57 Council Decision 2007/533/JHA.

236 COM (2010) 385, p. 6.

237 COM (2010) 385, p. 6.

Dublin system.<sup>238</sup> The system runs on the s-TESTA network.<sup>239</sup> Directive 95/46/EC applies to EURODAC.<sup>240</sup> A new regulation concerning EURODAC is in the making which will ensure that national police forces and Europol can access the data available in EURODAC to compare fingerprints in criminal investigations.<sup>241</sup> At the time of writing, this regulation has yet to be published.

The **VISA Information System (VIS)** is meant to implement a common visa policy by facilitating the examination of visa applications and external order checks. Its second purpose is to help prevent threats to the internal security of the EU.<sup>242</sup> Mirroring SIS II, it also has a national section in each participating state and a central data system in France.<sup>243</sup> Accessible data includes visa application, photographs, fingerprints, related decisions of visa authorities and links between applications.<sup>244</sup> Visa, asylum, immigration and border control authorities may access the system in order to verify identities and the authenticity of visas.<sup>245</sup> Moreover, police authorities and Europol have access to the system in order to prevent and combat terrorism and other forms of serious crime.<sup>246</sup> Technically, VIS also works on the s-TESTA system and is applicable to all EU Member States.<sup>247</sup>

The **Advance Passenger Information (API)** regulates the exchange of information concerning passengers on air carriers (private operators).<sup>248</sup> This instrument stipulates that on request, EU Member States must send passenger details to the authorities of third countries.<sup>249</sup> The purpose of this instrument is to improve border control and combat irregular migration.<sup>250</sup>

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238 COM (2010) 385, p. 7; Council Regulation (EC) No 343/2003 (Dublin Regulation).

239 COM (2010) 385, p. 7.

240 COM (2010) 385, p. 7.

241 Brussels 7 December 2012, COM (2012) 735, p. 5; [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/identification-of-applicants/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/identification-of-applicants/index_en.htm).

242 Council Decision 2004/512/EC; Regulation (EC) NO 767/2008; Council Decision 2008/633/JHA; Brussels 7 December 2012, COM (2012) 735, p. 7.

243 COM (2010) 385, p. 7.

244 COM (2010) 385, p. 7.

245 COM (2010) 385, p. 7.

246 Article 1 and 2 Council Decision 2008/633/JHA.

247 COM (2010) 385, p. 8 (it states here that the UK and Ireland are an exception; however, later online sources reveal that VIS is applicable for all EU Member States, for instance: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system/index_en.htm)).

248 Article 2 under a Council Directive 2004/82/EC.

249 Article 1 Council Directive 2004/82/EC; COM (2010) 385, p. 7.

250 Article 1 Council Directive 2004/82/EC; COM (2010) 385, p. 8.



14.4.4 *Information-exchange of criminal records between Member States  
(ECRIS)*

Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States forms the framework for the establishment of the European Criminal Records Information System (ECRIS).<sup>251,252</sup>

**Purpose of Framework Decision 2009/315/JHA**

According to Article 1, the purpose of the Framework Decision is to define the way in which convicting Member States – when the person concerned is another Member State's national – should hand over information on those criminal convictions to the Member State(s) of which the person is a national (sub a); to define the storage obligations of the Member State of the person's nationality; to specify how to reply to requests for information (sub b); and to lay down a framework for an ICT system for the exchange on information for the purpose of the Framework Decision (sub c). The latter has resulted in the establishment of ECRIS in Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA.

Article 2 defines the key terms, namely 'conviction',<sup>253</sup> 'criminal proceedings',<sup>254</sup> and 'criminal records'.<sup>255,256</sup> Article 3 continues by identifying the Member States' obligation to establish a central authority or authorities.

**Information exchange under Framework Decision 2009/315/JHA<sup>257</sup>**

With regard to information exchange as discussed in this report, the Framework Decision first specifies what obligations on information exchange exist for convicting Member States

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251 Council Decision 2009/316/JHA of 16 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA. This was based on an earlier pilot in which eleven EU countries exchanged information on criminal records electronically: the 'Network of judicial registers' – pilot project. See: <http://ec.europa.eu/justice/criminal/european-justice/ecris/>.

252 In 2007, the establishment of a European Police Records Index System (EPRIS) was also proposed. However, the Commission concluded in 2012 that the current information exchange system works well, and it discontinued development of EPRIS. See Council Document 15526/1/09 of 2 December 2009; COM(2010) 385 final of 20 July 2010; COM(2012) 735 final of 7 December 2012 and Vermeulen 2012.

253 'any final decision of a criminal court against a natural person in respect of a criminal offence, to the extent that these decisions are entered in the criminal record of the convicting Member State.'

254 'the pre-trial stage, the trial stage itself and the execution of the conviction.'

255 'the national register or registers recording convictions in accordance with national law.'

256 The same definitions apply to the Council Decision on ECRIS, see Article 2 Council Decision 2009/316/JHA.

257 Provisions concerning information exchange with third states have been omitted from this report, as they are outside its scope.

(Article 4) and then notes the obligations of Member States of which the person is a national (Article 5). Furthermore, it regulates which information can be requested (Article 6) and how one should reply to such a request (Article 7) as well as the deadlines for such requests (Article 8). It also specifies the regime for using personal data (Article 9).

The Framework Decision supplements Article 13 of the European Convention on Mutual Assistance in Criminal Matters (1959) and its additional Protocols as well as the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU (2000) and its Protocol of 16 October 2001.<sup>258</sup> The right to rely on the reservations made to Article 13 of the European Convention on Mutual Assistance in Criminal Matters (1959) is waived, which means that reservations regarding the refusal of requests may not be used to refuse requests under Framework Decision 2009/315/JHA.<sup>259</sup> The Framework Decision furthermore replaces Article 22 of the European Convention on Mutual Assistance in Criminal Matters (1959), concerning the obligation to inform other Contracting Parties to that Convention of criminal convictions of the latter Parties' nationals.<sup>260</sup> Furthermore, Decision 2005/876/JHA concerning the exchange of information extracted from the criminal record has been repealed.<sup>261</sup>

Article 4 paragraph 1 obliges convicting Member States to report the nationality of convicted persons when that person is a national of another Member State. Upon request and in individual cases, a copy of the convictions, subsequent measures and other relevant information is sent to the Member State of which the convicted person is a national for the purpose of considering measures at a national level.<sup>262</sup> The central authority of the convicting Member State must send this information to the central authorities of the person's nationality as soon as possible,<sup>263</sup> along with information on subsequent alterations or deletions of the information contained in the convicting Member State's criminal record.<sup>264</sup> The central authority of the Member State of which the person is a national is obliged to store all obligatory information, optional information and additional information as specified in Article 11 as well as information on any alterations or deletions of information for the purpose of retransmission.<sup>265</sup> Furthermore the Member State of which the person is a national notifies the convicting Member State that it has received the information.<sup>266</sup> The 'ECRIS Manual for practitioners' (hereafter: ECRIS Manual) identifies four

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258 Article 12 paragraph 1 Framework Decision 2009/315/JHA.

259 See [www.minbuza.nl](http://www.minbuza.nl) for a list of the reservations.

260 Article 12 paragraph 3 Framework Decision 2009/315/JHA.

261 Article 12 paragraph 4 Framework Decision 2009/315/JHA.

262 Article 4 paragraph 4 Framework Decision 2009/315/JHA.

263 Article 4 paragraph 2 Framework Decision 2009/315/JHA.

264 Article 4 paragraph 3 Framework Decision 2009/315/JHA.

265 Article 5 Framework Decision 2009/315/JHA.

266 Note from the Presidency to Coreper/Council regarding a Manual for Practitioners – ECRIS of 7 December 2011 Brussels, 17879/1/11 Rev 1, p. 7.

reasons for rejecting information received from the convicting Member State, such as death of the person and when the person cannot be identified unambiguously.<sup>267</sup>

Article 6 of the Framework Decision allows for Member States to request information on convictions. Important for this report is the following phrase in paragraph 1 of Article 6:

‘When information from the criminal record of a Member State is requested for the purposes of criminal proceedings against a person or *for any purposes other than that of criminal proceedings* (emphasis by authors)’ a request may be submitted to extract data from the criminal record.

According to the ECRIS Manual, requests issued for other purposes than criminal proceedings should be replied to in accordance with the national law of the requested Member State.<sup>268</sup> When such a request is submitted for purposes other than criminal proceedings, the other purpose should be stated in the request.<sup>269</sup> The ECRIS Manual specifically states that requests from an administrative authority are potentially admissible if they are in accordance with the national law of the requested Member State.<sup>270</sup>

Article 7 determines how to reply to a request made under Article 6 Framework Decision 2009/315/JHA. When it concerns a request *for the purpose of criminal proceedings* to the Member State of the person’s nationality, the requested Member State’s central authority transmits information about:

- a. any convictions handed down in the Member State of his nationality as entered in that Member State’s criminal record system;
- b. any convictions handed down in other Member States and transmitted to the Member State of the person’s nationality after 27 April 2012;
- c. any convictions handed down in other Member States and transmitted to the Member State of the person’s nationality by 27 April 2012 and;
- d. any convictions handed down in third countries and transmitted to the criminal record system of the Member State of the person’s nationality.<sup>271</sup>

267 Note from the Presidency to Coreper/Council regarding a Manual for Practitioners – ECRIS of 7 December 2011 Brussels, 17879/1/11 Rev 1, p. 7-8.

268 Note from the Presidency to Coreper/Council regarding a Manual for Practitioners – ECRIS of 7 December 2011 Brussels, 17879/1/11 Rev 1, p. 8.

269 Note from the Presidency to Coreper/Council regarding a Manual for Practitioners – ECRIS of 7 December 2011 Brussels, 17879/1/11 Rev 1, p. 9.

270 Article 6 paragraph 1 and Article 7 paragraph 2 Framework Decision 2009/315/JHA; Note from the Presidency to Coreper/Council regarding a Manual for Practitioners – ECRIS of 7 December 2011 Brussels, 17879/1/11 Rev 1, p. 8-9.

271 Article 7 paragraph 1 Framework Decision 2009/315/JHA.

When the request is intended for any purposes other than criminal proceedings, the requested Member State of the person's nationality replies by providing the same information as mentioned in the four categories above, but in accordance with its national law.<sup>272</sup>

Hence, if the requested Member State's national law does not allow for transmission of any of the four categories, the information cannot be transmitted under the Framework Decision.

The Member State of which the person is a national can retransmit information stored in its criminal records that had been transmitted to it previously by another, earlier convicting Member State or third state, provided that the Member State indicates that such information will only be retransmitted for the purpose of criminal proceedings. If another Member State nevertheless requests information for purposes other than criminal proceedings, the requested Member State is obliged to inform the requesting Member State about these limitations and direct the requesting Member State to submit a request directly to the convicting Member State.<sup>273</sup>

The request for such information is submitted electronically or by using the form provided in Annex A of Framework Decision 2009/315/JHA.<sup>274</sup> In principle, the requests of other Member States should be answered immediately or within ten working days.<sup>275</sup>

The information which can be exchanged under the Framework Decision consists of obligatory information (information on the convicted person; on the nature of the conviction; on the offence; and on the contents of the conviction),<sup>276</sup> optional information (parents' names; reference number of the conviction; place of the offence and disqualifications arising from the conviction)<sup>277</sup> and additional information (identity number; fingerprints; pseudonym or aliases if applicable).<sup>278</sup>

With the exception of pseudonyms and aliases, the information received under Article 11 paragraph 1, is stored by the receiving Member State in accordance with Article 5 paragraph 1 for the purpose of retransmission as specified by Article 7 of the Framework Decision.<sup>279</sup>

Finally, Article 9 regulates the conditions for using personal data. Paragraph 1 determines that information exchanged for the purpose of criminal proceedings may only be used for that purpose. Information requested for any other purposes can be used by the

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272 Article 7 paragraph 2 Framework Decision 2009/315/JHA.

273 Article 7 paragraph 2 Framework Decision 2009/315/JHA.

274 Article 6 paragraph 4 Framework Decision 2009/315/JHA.

275 Article 8 paragraph 1 Framework Decision 2009/315/JHA. The same paragraph applies a similar provision when the Member State requests additional information for the purpose of executing the request. The timeframe of ten days starts when the additional information is received.

276 Article 11 paragraph 1 Framework Decision 2009/315/JHA.

277 Article 11 paragraph 1 under b Framework Decision 2009/315/JHA.

278 Article 11 paragraph 1 under c Framework Decision 2009/315/JHA.

279 Article 11 paragraph 2 Framework Decision 2009/315/JHA.

requesting Member State in accordance with its national law, but only for the purpose for which it was requested and limited by restrictions as imposed by the requested Member State.<sup>280</sup> This rule is subject to one exception only: the prevention of an immediate and serious threat to public security in the requesting Member State.<sup>281</sup>

The ECRIS ICT system was established in April 2012 based on Article 11 of Framework Decision 2009/315/JHA.<sup>282</sup> ECRIS is a decentralized information technology system and consists of two elements, namely interconnection software enabling the exchange of information between Member States' criminal records databases and a common communication infrastructure, more specifically s-TESTA.<sup>283</sup> Explicitly excluded is the creation of a centralized criminal records database,<sup>284</sup> as well as direct access by central authorities, as established in Article 3 Framework Decision 2009/315/JHA, to the databases of other Member States.<sup>285</sup> In order to harmonize the various offences as identified in the various national criminal codes, Article 4 of the Council Decision establishes Annex A, which consists of a code book with the relevant name and legal classifications of offences as meant by the Member State.<sup>286</sup> A separate Annex B contains information on the nature and/or execution conditions of penalties and measures, including the parameter 'non-criminal ruling' (added voluntarily).<sup>287</sup> The Council can adopt modifications to both Annexes by qualified majority after consulting the European Parliament.<sup>288</sup> There is also a provision on the drawing up of a non-binding Manual for ECRIS,<sup>289</sup> which, as we saw earlier, has in fact been drawn up and disseminated among the Member States.<sup>290</sup>

In conclusion, Framework Decision 2009/315/JHA and the subsequent ECRIS ICT system allow for the exchange of information contained in the EU Member States' criminal records for purposes other than criminal proceedings, including the exchange of that information to administrative authorities. However, this exchange must be in accordance with the national law of the *requested* Member State. If exchange with an administrative authority is therefore ruled out entirely or restricted in the requested Member State itself, the requesting Member State cannot obtain this information for the purpose of transmitting it to an administrative authority. The ECRIS Manual permits the inclusion of information

280 Article 9 paragraph 2 Framework Decision 2009/315/JHA.

281 Article 9 paragraph 3 Framework Decision 2009/315/JHA.

282 <http://ec.europa.eu/justice/criminal/european-e-justice/ecris/>.

283 Article 3 paragraph 1 and 5 Council Decision 2009/316/JHA.

284 Article 3 paragraph 2 Council Decision 2009/316/JHA.

285 Article 3 paragraph 3 Council Decision 2009/316/JHA.

286 Article 4 paragraph 1, article 5 paragraph 1 under a and Annex A Council Decision 2009/316/JHA.

287 Article 4 paragraph 2, article 5 paragraph 1 under b and Annex B Council Decision 2009/316/JHA.

288 Article 6 paragraph 1 Council Decision 2009/316/JHA.

289 Article 6 paragraph 2 under a Council Decision 2009/316/JHA.

290 Note from the Presidency to Coreper/Council regarding a Manual for Practitioners –ECRIS of 7 December 2011 Brussels, 17879/1/11 Rev 1.

on basic national rules and procedures, for example concerning requests for administrative purposes.<sup>291</sup> The Member States have not added such information (as yet), however.<sup>292</sup>

#### 14.4.5 *Information exchange structure regulated by the Naples II Convention*

The **Customs Information System (CIS)** was set up with a view to preventing, investigating and prosecuting infringements of national and Community customs regulations.<sup>293</sup> The CIS is part of the Anti-Fraud Information System operated by OLAF<sup>294,295</sup> It is a centralized information system managed by the European Commission. According to Article 3 of Council Decision 2009/917/JHA, CIS can be accessed via terminals in each Member State, at the Commission, Europol and Eurojust.<sup>296</sup> The data that can be accessed consists of personal data,<sup>297</sup> as well as data on means of transport, businesses, persons and goods and cash retained, seized or confiscated.<sup>298</sup> The system is mainly intended for customs authorities, but other authorities may also access the system as long as they adhere to the purpose laid down in Article 1 Council Decision 2009/917/JHA, namely to prevent, investigate and prosecute infringements of national and Community customs regulations.<sup>299</sup> Article 20 to 26 Council Decision 2009/917/JHA regulates personal data protection. There is no indication that the information stored in CIS can be used for purposes other than the aims as mentioned in Article 1 Council Decision 2009/917/JHA.

A CIS-connected database is the **Customs File Identification Database (FIDE)**, which enables authorities to ascertain whether authorities from other Member States have investigated or are still investigating a person or business.<sup>300</sup>

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291 Note from the Presidency to Coreper/Council regarding a Manual for Practitioners – ECRIS of 7 December 2011 Brussels, 17879/1/11 Rev 1, p. 17.

292 Note from the Presidency to Coreper/Council regarding a Manual for Practitioners – ECRIS of 7 December 2011 Brussels, 17879/1/11 Rev 1, p. 17.

293 Based on the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the use of information technology for customs purposes. *O.J.* C316/34, as amended by the Council Decision 2009/917/JHA.

294 The European Anti-Fraud Office.

295 Brussels 7 December 2012, COM (2012) 735, p. 5.

296 Article 8, 11 and 12 Council Decision 2009/917/JHA.

297 See also Article 4 paragraph 2, 3, 4 and 5 Council Decision 2009/917/JHA for personal data protection. Reference is made under paragraph 5 of Article 4 to the Framework Decision 2008/977/JHA regarding ‘forbidden’ information.

298 Article 3 paragraph 1 sub a-h Council Decision 2009/917/JHA.

299 Article 7 Council Decision 2009/917/JHA.

300 Article 15-19 Council Decision 2009/917/JHA.

14.4.6 *The information exchange structure regarding specific relevant topics  
in the EU*

**14.4.6.1 The information exchange structure of the Financial Intelligence Units**

Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (hereafter: Directive 2005/60/EC) imposed the obligation to set up a system of Financial Intelligence Units (FIUs) for the Member States of the European Union.<sup>301</sup> This means that a national central unit has been established in each Member State with the aim of combatting money laundering and terrorist financing.<sup>302</sup> The FIUs are permitted to receive, and (to a certain extent) request, information, analyse that information and disseminate information to the competent authorities.<sup>303</sup> These activities constitute the core function of an FIU.<sup>304</sup> The information concerns potential money laundering or terrorist financing.<sup>305</sup> The FIUs have access to the relevant financial, administrative and law enforcement information for the proper fulfilment of their tasks.<sup>306</sup> The institutions and persons as covered by Directive 2005/60/EC, including private entities such as banks, are obliged to supply the FIUs with information in certain situations involving a suspicion of money laundering and/or terrorist financing.<sup>307</sup> Article 38 of Directive 2005/60/EC furthermore provides for international cooperation between the FIUs.<sup>308</sup>

Article 36 of Directive 2005/60/EC requires Member States to license currency exchange offices and trust and company service providers. Licences can be refused when the authority assigned to grant the licence is not convinced that the directors/managers (to be) or owners are fit and proper persons.

As Directive 2005/60/EC refers to access to information, including financial, administrative and law enforcement information transmitted to and from the FIUs by competent authorities, it may very well be possible to exchange information in support of an administrative approach. However, the exchange would remain purpose-bound, focusing exclusively on money laundering and terrorist financing. The Directive makes no provision for the exchange or forwarding of information for other purposes.

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301 The first FIUs however were established in the mid-1980s. Moreover, the Member States of the European Union are not the only countries to have established FIUs. For a more detailed historical overview of FIUs internationally, see Gleason & Gottselig 2004, p. 1-3.

302 Article 21 paragraph 1 Directive 2005/60/EC.

303 Article 21 paragraph 2 Directive 2005/60/EC.

304 Gleason & Gottselig 2004, p. 33.

305 Article 21 paragraph 2 Directive 2005/60/EC.

306 Article 21 paragraph 3 Directive 2005/60/EC.

307 Article 22-24 Directive 2005/60/EC.

308 Article 38 Directive 2005/60/EC.

#### 14.4.6.2 Information exchange structure of the Asset Recovery Offices

Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime establishes national Asset Recovery Offices (nAROs). There is at least one nARO in each Member State.<sup>309</sup> The Member States decides how and in what form nAROs are to be established, as well as how information is obtained on a national level.<sup>310</sup> The nAROs are meant to facilitate the tracing and seizure of proceeds from crime and other property belonging to criminals by exchanging information and best practices.<sup>311</sup> For this purpose the nAROs cooperate and can exchange information both on request or spontaneously.<sup>312</sup> Cooperation is also possible if the confiscation measures do not fall under criminal law but are equivalent.<sup>313</sup> These measures however must be ordered by a judicial authority in relation to a criminal offence.<sup>314</sup> The Decision specifically mentions that the legal status of a nARO, albeit falling under a law enforcement, administrative or judicial authority, should not prevent it from cooperating with nAROs in the other Member States, taking into account the diversity of law enforcement existing in the Member States.<sup>315</sup> Furthermore, the information exchange should adhere to the regulations and procedures of the Swedish Initiative.<sup>316</sup> A nARO or competent authority in a Member State can request information in writing from another nARO for the purpose of tracing and seizing proceeds from crime and other property belonging to criminals.<sup>317</sup> The requesting nARO or authority must provide precise details on the property targeted or sought, and on the natural or legal persons involved, or presumed so.<sup>318</sup> Furthermore the nAROs or competent authorities in Member States can exchange information spontaneously. This spontaneous information exchange is subject to the limits of the applicable national law and to the same conditions as an exchange of information on request.<sup>319</sup>

Article 5 of the Council Decision stipulates that the Member States must ensure the established regulations on data protection. Moreover, the information exchanged is subject to the data protection rules of the receiving Member State, as if that information was gathered in the receiving Member State.<sup>320</sup> Data that has been exchanged is protected under

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309 Article 1 Council Decision 2007/845/JHA.

310 Explanatory memorandum, Council Document No. 7259/06 Add 1, p. 4.

311 Article 1 Council Decision 2007/845/JHA.

312 Article 2 paragraph 1 Council Decision 2007/845/JHA.

313 Explanatory memorandum, Council Document No. 7259/06 Add 1 p. 5.

314 Explanatory memorandum, Council Document No. 7259/06 Add 1, p. 5.

315 Article 2 paragraph 2 Council Decision 2007/845/JHA.

316 Article 3 paragraph 1 and 2 and article 4 paragraph 1 and 2 Council Decision 2007/845/JHA; Explanatory memorandum, Council Document No. 7259/06 Add 1, p. 5.

317 Article 3 paragraph 1 Council Decision 2007/845/JHA.

318 Article 3 paragraph 2 Council Decision 2007/845/JHA.

319 Article 4 Council Decision 2007/845/JHA.

320 Article 5 Council Decision 2007/845/JHA.



the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data and, where ratified, the Additional Protocol of 8 November 2001 to that Convention, regarding Supervisory Authorities and Transborder Data Flows. The principles of Recommendation No R(87) 15 of the Council of Europe Regulating the Use of Personal Data in the Police Sector should be taken into account when handling personal data.<sup>321</sup>

All EU Member States included in this research have established one or more nAROs.<sup>322</sup>

We can conclude that, because the nAROs' scope of application is broader than criminal law alone, information exchange in support of an administrative approach is possible for nAROs. However, such exchanges must adhere to the purpose for which the nAROs have been established: facilitating the tracing and seizure of proceeds of crime and other property belonging to criminals. Furthermore, the information exchange must comply with the framework for personal and other data protection for nAROs.

#### **14.4.6.3 Information exchange in the field of cybercrime and cybersecurity**

The European Network and Information Security Agency (ENISA)<sup>323</sup> was established in 2004.<sup>324</sup> Recently, Regulation 526/2013 of 21 May 2013 concerning the European Union Agency for Network and Information Security (ENISA) and repealing Regulation 460/2004 (hereafter: ENISA Regulation) re-established ENISA. ENISA is meant to contribute to and raise awareness of the need for high-level network and information security within the European Union.<sup>325</sup> For the purposes of this report, we discuss only the relevant ENISA provisions regarding information exchange.

The ENISA Regulation has a single objective when it comes to information exchange. Article 3 paragraph 1 under b (vi) specifies that that ENISA assists the institutions, bodies, offices and agencies of the EU and the Member States in collecting, analysing and disseminating relevant network and information security data. Article 14 furthermore specifies that the European Parliament, the Council, the Commission and the competent body of a Member State may request advice and assistance as long as this falls within the scope of the objective and tasks of ENISA. Protection of data is regulated in Article 17 concerning the confidentiality of information upon request, and in Article 29 regarding the protection of personal data and the applicability of Regulation 45/2001.

Regarding the information-exchange structure for network and information security, Article 3 paragraph 1 under b (iv) regulates that ENISA will support the capabilities of

321 Article 5 Council Decision 2007/845/JHA.

322 Brussels 12 April 2011 COM (2011) 176, p. 3ff and <http://star.worldbank.org/star/sites/star/files/Italy-Asset-Recovery-tools-and-procedures.pdf>.

323 Drewer & Ellerman 2012, p. 382.

324 Regulation 2004/460.

325 Article 1 paragraph 1 ENISA regulation.

national/government and EU Computer Emergency Response Teams (CERTs) by exchanging information to ensure a common set of practices for each CERT, among other things. Related to this, Article 3 paragraph 1 under b (iii) specifies that ENISA will assist the institutions and bodies of the EU by supporting the operation of a Computer Emergency Response Team (CERT). Outside the scope of the ENISA Regulation, a network of national liaison officers has been established.<sup>326</sup>

Interestingly enough, there are no provisions made to regulate the actual information exchange, nor is there any reference to other regulatory instruments (such as the Swedish Initiative) providing a framework for information exchange. One can deduce that information exchange under the ENISA framework is broad, limited only by the objective and tasks of the agency. That means that the exchange of information in support of an administrative approach to crime might very well be possible under the ENISA regime.

Additionally, as discussed earlier, ENISA is involved in the European Cyber Crime Centre (EC3), established under the auspices of Europol.

#### **14.4.6.4 Information exchange in the fight against child exploitation and pornography**

Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating sexual abuse and sexual exploitation of children, and child pornography, replacing the Council Framework Decision 2004/68/JHA (Directive 2011/92/EU) introduces several offences concerning child pornography. In addition, Article 10 of the Directive regulates minimum rules regarding the disqualification arising from previous convictions in EU Member States. Article 10 paragraph 1 states that Member States must take measures to prevent natural persons convicted of the offences specified in Articles 3 to 7 of the Directive from exercising, either temporarily or permanently, professions involving direct and regular contact with children. In doing so, employers are entitled to request information when they are recruiting persons either for professional or organized voluntary activities that involve direct and regular contact with children. National law arranges the way such a request should be made, e.g. access, on request or via the person concerned, to relevant criminal conviction records.<sup>327</sup> The Directive gives some examples of such a request.<sup>328</sup> For the exchange of information between Member States on previous criminal convictions for any of the offences listed in Articles 3 to 7 of the Directive, or on other disqualifications arising from such criminal convictions, the Member States can request information based on Article 6 of the Council Framework Decision 2009/315/JHA of 26 February 2009 on

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<sup>326</sup> <http://www.enisa.europa.eu/about-enisa/structure-organization/national-liaison-office>.

<sup>327</sup> Article 10 paragraph 2 Directive 2011/92/EU.

<sup>328</sup> Article 10 paragraph 2 Directive 2011/92/EU.

the organization and content of the exchange of information extracted from criminal requests between Member States, which is discussed in Section 14.3.2.4.

In the Netherlands, the screening of persons working in child day care takes place continuously based on a system of *Verklaring Omtrent het Gedrag* (VOG). For a detailed explanation of this system, see chapter 8 of this research.

**Table 14.2 Schematic overview on the organizational structure on information exchange within the area of freedom, security and justice**

Organizational structure for information exchange/sharing	Information exchange possibly providing a structure for the administrative approach	Information exchange permitted in support of an administrative approach?
<b>Europol</b>	1. Europol National Units (ENU) 2. Secure Information Exchange Network Application (SIENA) 3. Europol Information System (EIS), including Analytic Work Files (AWF) 4. Operational and strategic arrangements with third parties (bodies & agencies EU and third countries)	Not presently.
<b>Eurojust</b>	1. National members (at Eurojust) 2. National Correspondents (in the Member States) 3. Eurojust National Coordination System (ENCS), including the Case Management System (CMS) 4. Contact with third parties (particularly the European Judicial Network, bodies & agencies EU and third countries)	Not presently.
<b>Schengen</b>	1. The Schengen Information System (SIS) and SIS II 2. SIRENE Bureaux 3. EURODAC 4. VISA Information System (VIS) 5. Advance Passenger Information (API)	Subject to the regime of the Schengen Convention: Yes, both for information exchange on request and spontaneous exchange, but only with the prior consent of the requested contracting party.
<b>Framework Decision 2009/315/JA &amp; Council Decision 2009/316/JHA (ECRIS)</b>	European Criminal Records Information System (ECRIS)	Yes, information exchange for purposes other than criminal proceedings is possible, but only to exchange information regarding criminal records and when the national law of the <i>requested</i> state allows such exchange.

<b>Organizational structure for information exchange/sharing</b>	<b>Information exchange possibly providing a structure for the administrative approach</b>	<b>Information exchange permitted in support of an administrative approach?</b>
<b>Naples II Convention</b>	1. Customs Information System (CIS), including Customs File Identification Database (FIDE)	Within the scope of infringements of national and European customs rules.
<b>Specific topics</b>	1. FIUs 2. National Asset Recovery Offices (nAROs) 3. ENISA 4. Directive 2011/92/EU	1. Yes, but limited to the purpose of the FIUs (money laundering and terrorist financing) 2. Yes, but limited to the purpose of nAROs (asset recovery) 3. May be possible due to its broad scope 4. Concerning previous offences listed in Articles 3-7 of the Directive committed in (other) EU Member States

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## **PART V**

### **CONCLUSIONS AND THE WAY FORWARD**





## 15 CONCLUSIONS

*A.C.M. Spapens, M. Peters & D. Van Daele*

### 15.1 INTRODUCTION

This study aimed to contribute to the existing body of knowledge concerning an administrative approach to crime in the European Union in the following manner. First, it explored the legal options available to national administrative authorities in the selected Member States to prevent criminals from misusing the legal infrastructure, such as licensing procedures or tender procedures. This resulted in ten separate country reports (Chapters 2-11), as well as a comparison of those legal options in the ten Member States (Chapter 12). Second, it considered the practical application of the legal options available in the selected Member States. The results of this empirical study are reviewed in Chapter 13. Last, it explored the potential for information exchange between EU Member States in support of an administrative approach to crime (Chapter 14). Based on the foregoing, the following conclusions can be drawn.

### 15.2 GENERAL CONCLUSIONS

A general conclusion is that the battle against serious and organised crime profits from cooperation between different public authorities and in some cases private partners as well. In (almost) all of the ten Member States included in this research, we found examples of coordinated responses to problems perceived as particularly serious. Such responses mostly referred to 'working apart together' in order to repress or disturb problems, and less to preventing criminals from infiltrating into the legitimate economy for example by denying licenses. The study shows that an administrative approach as such is nothing new; the Member States mostly differ in how they apply administrative legislation to reduce or prevent crime problems.

All Member States have legislation in place to regulate businesses as well as to prevent public order disturbances, which is suitable in the context of an administrative approach to crime. Policies (if formulated at all), legislation and underlying structures however, differ widely.

It is important to stress that an administrative approach to crime does not replace or present an alternative to traditional law enforcement. Instead, it complements law enforcement and depends on information from the police and judicial authorities to be

effective. Therefore, information exchange between administrative authorities, law enforcement agencies and the tax authorities is *a condition sine qua non* for any coordinated response to serious and organised crime problems. Particularly the options for law enforcement agencies and the tax authorities respectively to share information with administrative bodies are sometimes limited. Administrative authorities are allowed to exchange information mutually. The provision of information by administrative bodies to law enforcement agencies and the tax authorities is usually possible within the context of a judicial investigation, and in most other cases. The reverse flow of information is more problematic. Only a few of the Member States studied here have platforms to share intelligence. Information may be exchanged informally, but this has its limitations because it depends highly on personal relations and denies the administrative authorities the use of information to base interventions on, because it was not 'officially' received.

In practice, an (ad-hoc) administrative approach is common to tackle the most serious and organized crime problems on the local, regional and national levels. However, the use of administrative measures to prevent that criminals infiltrate in the legitimate economy is less far developed in most of the countries studied here.

Highly relevant for the EU is the lack of a clear legal and organisational framework for the exchange of law enforcement and fiscal information with administrative bodies. Member States such as the Netherlands, Belgium and Italy already call for action in this respect and we expect that others who are now in the process of adopting an administrative approach to crime will follow. The existing legal and organisational infrastructure does not provide a clear-cut framework for the exchange of information from law enforcement agencies or the tax authorities on the one hand and administrative agencies on the other. This represents a serious blind spot and requires action at the EU-level. First, because criminals can physically move to another Member State or establish a business there and thus circumvent effective preventative screening. Second, because it reduces the opportunities for administrative bodies to take repressive action (or to disrupt) an illegal activity if this requires criminal or fiscal information.

Below we present the conclusions in more detail and formulate a number of recommendations.

### 15.3 TOWARDS A PRACTICAL DEFINITION OF THE TERM 'AN ADMINISTRATIVE APPROACH TO SERIOUS AND ORGANIZED CRIME'

At the start of this project, there existed no exact definition of the concept of an administrative approach to serious and organised crime. Therefore, we adopted a working definition focused primarily on the prevention of crime. During the project, it became clear that an

administrative approach is equally relevant for the repression and disruption of crime and this prompted us to amend the definition as follows:

*An administrative approach to (serious and organised) crime encompasses prevention of the facilitation of illegal activities by denying criminals the use of the legal administrative infrastructure as well as coordinated interventions ('working apart together') to disrupt and repress (serious and organised) crime and public order problems.*

As explained in Chapter 1 of this report, the word 'administrative' is itself ambiguous because it has various meanings as both an adjective and a noun. In addition, the concept of administrative law as such is very broad and grounded by each state in its national law. Consequently, administrative law is nationally oriented and the same is true for the concept of 'administrative authority.' There is thus no universally accepted definition of the term 'administrative law'. This is partly because of the difference between common law and the European continental legal systems. In essence, administrative law under common law focuses on the administrative authorities, their role, function and supervision of their actions, i.e. judicial review. In continental legal systems, administrative law also includes various substantive branches of administrative law, often arranged by theme.

Moreover, the scope of the term 'approach' is not clear-cut. This particularly complicates any legal or other comparison, although it does not make it impossible.

In practice, the concept of an 'administrative approach' encompasses both the prevention and repression (or disruption) of illegal activities. First, authorities make use of administrative regulations to deny criminals access to the legitimate economy, specifically by barring them from businesses they may use to facilitate illegal activities or acquire a legal income. Second, authorities apply administrative and fiscal provisions in conjunction with criminal law in order to disrupt and repress illegal activities. In other words, different authorities 'work apart together' and coordinate their efforts in tackling different aspects of crime problems.

Both prevention and repression are a part of what we can define as an administrative approach. All sorts of administrative rules and regulations can be applied to repress and disrupt organized and other crime, whereas regulations for preventive screening are encompassed in specific national legislation. Furthermore, in the context of repression an administrative approach does not necessarily imply that only the administrative authorities are involved. Instead, 'working apart together' includes other public bodies as well, particularly law enforcement agencies and the tax authorities, and in some cases private parties.

Our study shows that to some extent, all ten Member States included in our research use administrative measures to combat crime, although there are many legal and practical differences. Some of the countries studied explicitly view an administrative approach as

part of a policy to reduce serious and organized crime, whereas other Member States apply such measures in a relatively unstructured and ad hoc manner. Particularly countries that systematically apply an administrative approach, such as the Netherlands, Italy and Belgium, are confronted with the problem that Member States refuse to submit crucial criminal and fiscal information to their competent administrative bodies. Thus, from an international viewpoint, the most pressing problem is the absence of a consistent legal and organizational framework that regulates the exchange between different countries of, specifically, criminal information for the purpose of administrative procedures.

#### 15.4 ADMINISTRATIVE MEASURES TO PREVENT CRIMINAL INFILTRATION IN THE LEGITIMATE ECONOMY

Most of the ten Member States studied here have not adopted a national policy to prevent crime systematically and structurally by administrative means. Notable exceptions are Italy, the United Kingdom<sup>1</sup> and the Netherlands, which have introduced policies applying administrative measures to prevent crime. These policies vary greatly and aim mainly to screen natural and legal persons that wish to start up businesses in specified sectors. However, only Italy and the Netherlands have adopted overarching legislation governing the screening of natural and legal persons applying for licences and government subsidies or submitting tenders for public contracts.

In the other selected Member States, measures to prevent criminal infiltration in the legitimate economy are a part of sector-specific business regulations. These are meant to ensure safety and protect the customer and the environment, but not necessarily to prevent crime.<sup>2</sup> In the case of applicants for tenders and subsidies, screening is primarily part of the process of selecting the most eligible and reliable candidate.

Requirements are usually stricter when the perceived level of risk is higher. A person who wishes to trade in firearms or operate a gambling company must comply with more extensive regulations than someone who wishes to open a shoe store, for example. For many types of businesses, the absence of a criminal record for offences relevant to the activity suffices. In specific cases, the authorities may also check other sources of information, such as police intelligence and fiscal data. Following on from this, in most of the countries studied, the provisions that might be used to prevent criminal infiltration are 'hidden' in a patchwork of business-specific legislation, as discussed in the legal comparison.

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1 It must be noted that our study did not include Scotland and Northern Ireland. However, these parts of the United Kingdom have developed comparable policies to disrupt serious and organized crime, as have England and Wales.

2 It must be noted that the overarching legislation in the Netherlands and Italy does not cover all businesses, and that there are separate business regulations that include requirements concerning a person's criminal background.

Specific administrative legislation is arranged either by theme (environmental administrative law, business regulations on economic activities) or geographically (competences of local, regional or national administrative authorities). The wide-ranging nature of the legislation gives administrative authorities the opportunity to be 'creative' in applying the law for the purposes of crime prevention. However, it is also difficult for them to oversee the legal options and apply them in practice, as there are so many different regulations and competent authorities to work with.

The EU has also contributed to the body of business regulations that include the requirement of screening. To begin with, it adopted Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC. Under this regulation, transport managers must not have been convicted of a serious criminal offence or have incurred a penalty for a serious infringement, in particular, of Community rules relating to road transport. In 2011 the EU followed up with Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating sexual abuse and sexual exploitation of children, and child pornography, replacing the Council Framework Decision 2004/68/JHA. This directive states that a person convicted of a number of specific offences 'must be prevented from exercising employment involving direct and regular contact with children.'

The conclusion arising from these findings is that all the Member States included in our study have legislation that can help prevent criminal infiltration in the legitimate economy. However, the scope of practical application in this context differs widely. Some of the Member States have already adopted legislation to this end, whereas others have just started to 'frame' business regulations to suit the context of crime prevention. Increasing economic integration in the EU will undoubtedly lead to a rise of the number of requests for criminal and fiscal information from one Member State to another. Although the ECRIS-database on criminal convictions is operational, exchange of 'soft' information is equally important and requires further action at both the Member States and the EU-level.

In the past years, the EU implemented regulations for the transport sector and for those who are working with children. Part of these regulations are provisions to prevent crime, for instance from banning persons with a relevant criminal record from working in these sectors. At the EU-level, such regulations including provisions for the cross-border exchange of information could also be introduced for other economic activities vulnerable to serious and organised crime, for example bars and restaurants, construction and waste disposal. However, such measures do have the risk of leading to complex and fragmented sector-specific regulation that is difficult for practitioners to work apply in the context of an administrative approach. In the long term, a structured legal instrument to allow for the

exchange of information on all types of administrative issues is inevitable when the Member States increasingly adopt and apply the concept of an administrative approach.

## 15.5 APPLYING ADMINISTRATIVE MEASURES TO TACKLE SERIOUS AND ORGANIZED CRIME

### 15.5.1 *Applying the competences of administrative authorities*

In many cases, the ‘business processes’ of organized crime depend on both illegal and legal activities, with the latter potentially being subject to administrative regulations. Human traffickers may, for example, require transport, housing and a business where they can put the victims to work; an outlaw motorcycle gang usually needs a clubhouse; the production of synthetic drugs also requires legally available chemicals, such as acetone and methy-lamine.

In all Member States, local and other administrative authorities have powers to maintain public order in their territory. They can inspect businesses, issue and revoke licences, impose fines, and close premises when administrative regulations are violated. In addition, in some Member States the administrative authorities may claim forfeited assets in administrative proceedings. Indications of violations may follow from inspections performed by their own staff, but also from information supplied by law enforcement agencies or the tax authorities. In addition, private parties may also have a role in this, such as in the Pol-PRIMETT example. Administrative powers can thus be applied to disrupt criminal activity as well as to stop criminals from using the infrastructure that facilitates their illegal activities (if they could not be denied access beforehand through preventive screening).

### 15.5.2 *‘Working apart together’*

Instruments based on administrative, fiscal and criminal law may be applied either separately or in combination. The latter is usually referred to as a multi-agency approach, although in practice ‘working apart together’ is a more appropriate term. Different agencies coordinate their efforts, but use their respective competences independently. The key to working apart together is information exchange between administrative, fiscal and law enforcement authorities within a single state. Information exchange is usually informal. However, the United Kingdom, Italy, Sweden, the Czech Republic, Poland and the Netherlands have developed permanent and semi-permanent cooperation initiatives at the national level. The United Kingdom, Italy, Sweden, Belgium and the Netherlands have also established temporary local or regional bodies for multi-agency cooperation and/or

information exchange, although the range of administrative authorities participating in these bodies differs per country.

Although coordinated approaches to combating organized crime clearly have added value, they also require external political pressure. Our study shows that 'working apart together' usually occurs when the authorities consider a crime problem to be particularly serious. This may be either a local issue, such as a motorcycle gang's hangout causing severe nuisance problems, or a national issue, for example the sale of dangerous new psychotropic substances. One important conclusion is that coordinated responses to crime are not exotic but can be observed in all ten of the Member States covered in our research. A number of Member States have established (semi-)permanent structures for integrated cooperation and information exchange in which the local administrative authorities play an important part, such as the RIEC's (the Netherlands) and the Centre of Knowledge against Organized Crime in Gothenburg. Other countries studied here have established structures at the national level in which different agencies cooperate. However, at the EU-level a structure for such cooperation is not yet available.

#### 15.6 INFORMATION EXCHANGE IS CRUCIAL

Effective application of administrative measures to prevent, repress and disrupt organized crime, either independently or in coordination with fiscal and law enforcement instruments, involves having both the opportunity and the will to share information. Specifically, police and judicial information often offers administrative authorities crucial reasons to justify interventions. Without such information, it is almost impossible for administrative authorities to take preventive or repressive actions.

It is important to distinguish between the exchange of a) previous convictions of natural and legal persons and b) information or intelligence on on-going police investigations regarding natural and legal persons. In general, administrative authorities have access to the first category of information either directly, via criminal records databases, or indirectly, when a request is filed for a certificate of good conduct. Access to the second type of information is much less obvious, but it can be important in the case of persons who have been under investigation but have never been officially convicted, such as straw men.

Some countries have legal obstacles that prevent the latter type of information being shared between government agencies. In Belgium, it is almost impossible for the tax authority to share information with administrative authorities. In some cases, law enforcement agencies are willing to share information informally. Although the administrative authorities cannot use such information for decision-making, it enables them to scrutinize the persons more closely. In all the Member States studied here, the administrative authorities are obliged to inform the judicial authorities if they have information about a

crime. Conversely, law enforcement agencies are usually not under an obligation to share information with administrative authorities. Only the Netherlands has introduced a 'tip function' of this kind in its legislation, although it is not an absolute requirement. If the public prosecutor is of the opinion that legitimate interests would be served by withholding information about an ongoing criminal investigation, he or she may do so.

Apart from the legal option of sharing information, trust is also crucial. First of all, secrecy is a natural part of the work of law enforcement agencies, and they may feel that sharing information with administrative bodies will endanger their own investigations or information sources. Second, government agencies may have doubts about the integrity of their counterparts. If the police suspect that local politicians or civil servants are corrupt, for example, they will feel little incentive to share information on illegal activities. Finally, historical aspects are important. Particularly in states that have experienced non-democratic regimes in the past, information exchange between different government agencies is a sensitive issue.

In summary: apart from the legal option of sharing information, mutual trust between government agencies is crucial to the success of an administrative approach.

## 15.7 INFORMATION EXCHANGE ACROSS BORDERS

We found that there are specific problems when Member States are required to exchange information with one another to support administrative measures aimed at preventing or repressing serious or organized crime. From a legal perspective, the main problem is the lack of a legal framework that clearly regulates the exchange and use of information collected by law enforcement agencies and tax authorities in one Member State for the purpose of administrative procedures in another. For future purposes, in this framework attention should be paid to data protection and privacy, an aspect which was only indirectly studied in Chapter 14. Only Council Framework Decision 2009/315/JHA of 26 February 2009 on the organization and content of the exchange of information extracted from the criminal record between Member States explicitly allows such requests with regard to the ECRIS database on convictions. Nevertheless, these requests need to be in accordance with the national law of the requested state.

Administrative authorities are allowed to obtain and use information exchanged under the existing legal framework for criminal proceedings with the prior consent of the requested state. Such provisions are included in the Schengen Implementation Convention (SIC), Council Framework Decision 2006/960/JHA on information exchange (the 'Swedish initiative') and Council Framework Decision 2008/615/JHA (the 'Prüm Decision'). Judicial information may be exchanged based on the EU Convention on Mutual Assistance in Criminal Matters. However, the prerequisite of prior consent leads to lengthy and laborious



procedures as well as the risk that the judicial authorities will be overloaded with such requests when administrative approaches to crime become common in the EU.

Furthermore, if the administrative authorities want to obtain such information, it is unclear whether they should file their request through the channels designed for the exchange of police information, such as Interpol, or do so directly via the judicial authorities. In principle, it is possible to exchange information through these channels for purposes other than criminal proceedings or for investigative purposes, but this requires permission from the requested state. The problems are therefore similar to those related to the content of the information. With regard to ECRIS, the situation is less complicated. For example, Directive 2011/93/EU refers to ECRIS as an applicable system to exchange information to screen persons who want to work with children. The range of information that can be exchanged for screening purposes in fiscal matters is also limited because the Naples II Convention only allows the use of the Customs Information System in cases concerning an infringement of national and European customs regulations.

Clearly, the situation outlined above is unsatisfactory from the perspective of the EU as well. To begin with, every citizen of the Union is free to move to another Member State and start a business there. If the applicant has no criminal record, but is known to be affiliated with an organized crime group, for example, the authorities cannot use the information to withhold a licence unless the judicial authorities of the requested Member State allow this. The same applies if the authorities intend to use the information to revoke a licence or impose other administrative measures. The requested party must give its permission to use specific information. Currently, the outcome of such requests remains unsure. Where one magistrate may give permission, another may reach a different conclusion, even in an identical case.

The problem outlined above raises the question of whether the EU can create new legislation to remove the obstacles to information exchanges for the purposes of an administrative approach to crime. Article 84 of the TFEU allows the Council and Parliament to create harmonizing legislation under the ordinary legislative procedure. However, only the Member States can initiate the procedure. An example is the Prüm process. Seven Member States signed the original Prüm Treaty in 2005, after which the majority of the provisions were included in EU legislation in 2008. Similarly, the Member States could decide to amend existing legislation to include provisions for the exchange of law enforcement information in the context of an administrative approach.

With regard to the problem of the institutional channels through which to exchange requests for information for an administrative approach, the options are similar. For the time being, the logical solution would be to expand the existing framework and allow also information exchanges supporting an administrative approach via the existing channels for law enforcement and fiscal information-sharing. It is, however, doubtful whether this 'rerouting' of information for purposes other than criminal proceedings will suffice if an

administrative approach to organized crime comes to full bloom throughout the entire Union. The requests would then overtax law enforcement structures that were not designed to facilitate an administrative approach.

## 16 THE ROAD AHEAD

*D. Van Daele, M. Peters & A.C.M. Spapens*

In the foregoing chapters, it has become clear that the concept of an administrative approach to crime has developed at different speeds in the studied Member States. Without going into depth here,<sup>1</sup> the Member States can be divided into three distinct groups. First, particular member states have systematically implemented a national policy, laws and practice in the framework of an administrative approach to crime. Second, other Member States have not systematically implemented a national policy or comprehensive law, but have gained experience with the concept of an administrative approach to crime through (local) initiatives in practice. Finally, still other Member States have not implemented a national policy, nor law and have little experience in practice.

Nevertheless, in all studied Member States, the legal potential for an administrative approach to crime is present. This implies that measures for maintaining public order and screening and monitoring of applicants concerning administrative decisions are present and can – in theory – be used for a future administrative approach to crime. Consequently, implementation of an administrative approach to crime in the studied Member States can make use of the found starting points; a common ground for an administrative approach to crime is present in all the Member States. For all Member States the administrative approach to crime, additional to traditional law enforcement, is a commendable policy to implement.

Taking the foregoing into account, it is rather evident that the described common ground present in the Member States for an administrative approach to crime needs to be strengthened to support all Member States in their different stages of development.

### 16.1 RECOMMENDED STEPS TO DEVELOP A EU POLICY ON AN ADMINISTRATIVE APPROACH TO CRIME

Article 84 TFEU allows the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to establish measures to promote and support the actions of the Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States. In conjunction with Article 76 TFEU, the Commission (as well as a quarter of the Member States) can propose legal measures

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1 We refer to the legal comparison in chapter 12 in particular.

to support and promote the actions of the Member States. Based on these articles, the Commission can develop several initiatives, including the following:

Firstly, the concept of an administrative approach to crime should be actively promoted towards both policy-makers and practitioners. The European Commission, in collaboration with Member States that have developed policies and legislation, should continue to invest and support capacity building in the Member States less familiar with the concept. This encompasses the raising of awareness regarding the use of existing business regulations in the context of (organized) crime prevention. Moreover, when Member States are interested, the possibilities of developing overarching policies and legislation in this context should be promoted.

Secondly, the European Union should fund programs and research looking to build experiences with the concept of an administrative approach to crime and multi-agency cooperation. All the more since the underlying study focused on only ten Member States. Hence, it is significant to further explore the possibilities in the other Member States. As experience with cross-border multi agency cooperation is still limited, in particular experiments or simulations concerning cross-border cooperation with administrative, fiscal and law enforcement authorities is recommended. Such research can explore the possible solutions for the legal and practical difficulties in the field in operational cases.

Lastly, in scope of the legislative competence offered by article 84 TFEU, the European Union should strengthen the current institutional framework. Here, actions can be undertaken both in the long and short term. In the short term, the Informal Network on the Administrative Approach to Prevent and Fight Organised Crime should be further substantiated to:

- promote the exchange of knowledge and experience on the EU level and;
- support the Member States in their development of an administrative approach to crime by becoming an advanced ‘EU Governmental Multi Agency Information and Expertise Centre’.

The foregoing should be supported with an official mandate as well as further financial support for the Informal Network. The opportunity should be seized to further build upon the existing network of national contact points, knowledge and experience. In doing so, more advanced Member States can exchange best practices and expertise with other Member States in the field of policy, legislation and practice. Moreover, information can be shared regarding occurring crime phenomena across borders, which can be approached with administrative measures, allowing (advanced) Member States to seize opportunities to cooperate and prevent displacement effects across the border.

In the long term it can be considered to give the ‘EU Governmental Multi agency Information and Expertise Centre’ a further coordinating and supporting role for national administrative and other authorities in cross-border operational cases. This can prevent

criminals from misusing the national legal infrastructure as well as the open borders in the Schengen area.

## **16.2 RECOMMENDED STEPS FOR IMPLEMENTATION OF AN ADMINISTRATIVE APPROACH TO CRIME ON THE NATIONAL LEVELS**

Save from support and promotion of the administrative approach by the European Union, it is also necessary that the Member States invest in this approach. Here, opportunities also exist in the present network of contact points of the Informal Network, which forms the building blocks for stimulating an administrative approach. First, each Member State has a contact point on the national level. Due to the size and/or governmental structure of certain Member States, these contact points can be extended to the administrative regions of the Member States. The contact points will provide in both an internal and external need. Internally, the national and regional contact points can provide support and best practices to the vast array of administrative authorities dealing with operational cases in the Member States. For future purposes, they can coordinate and support application of administrative measures as well as cooperation between administrative authorities and other authorities. Externally, these contact points are the link between a 'EU governmental multi agency information and expertise centre' and the authorities dealing with operational cases, ensuring that the exchange of knowledge and best practices on the EU level would factually reach the authorities on the ground as well as to communicate issues and best practices arising bottom-up.

## **16.3 RECOMMENDED STEPS FOR INTERNATIONAL AND NATIONAL INFORMATION EXCHANGE**

Currently, the rising attention and awareness for an administrative approach to crime, both in the Member States and at EU level, leads to a crucial issue. As has been stressed in the previous chapters, when applying administrative measures the information position of administrative authorities is pivotal, particularly regarding law enforcement information. Information-exchange for the purposes of an administrative approach to crime is critical in the national context, to prevent criminals from infiltrating in the legal economy. After all, administrative authorities can only intervene if they have information on a person's criminal background allowing them to cancel or refuse an administrative decision. Hence, nationally, each Member State can consider within its own national legal context regulations providing administrative authorities with the means to (in)directly access law enforcement information, information on convictions and fiscal information.

From an international scope, opportunities for cross-border criminality across the EU, such as the found displacement effect in the Belgium-Dutch border regions or the EXPO 2015 held in Milan, which attracted many foreign investors, beg for cross-border information-exchange for the purposes of an administrative approach to crime. Here, we can differentiate between actions in the long term and in the short term to be considered by the European Union.

First, in the long term, the European Union should consider framing a legal instrument specifically for information-exchange for the purposes of an administrative approach to crime. Such an instrument should include provisions legally enabling cross-border information exchange, address the institutional framework allowing for such an exchange and deal with relevant questions of privacy and data protection.

In the short term, however, legislative action should also be undertaken regarding the adaption of current instruments established for the purposes of information-exchange for criminal matters. As shown in chapter 14, several measures, such as the Prüm Decision, the Swedish Initiative and ECRIS, allow for the exchange of information for other purposes than criminal investigations when prior consent of the relevant authority has been obtained. The provisions for exchange of information in these instruments can be extended to also including an administrative approach to crime, for instance by revising Articles 13 and 14 of the Prüm Decision to allow exchange of information for preventive purposes, not limited to major cross-border events only. Another option could be to revise article 3 or 7 of the Swedish Initiative to include information-exchange for the purposes of an administrative approach to crime.

Furthermore, the information-exchange for an administrative approach to crime deserves an institutional framework in the Member States. The European Commission should promote and support development of a specific infrastructure for the purposes of exchange of information in the context of an administrative approach to crime. Currently, when cross-border information exchange occurs, it takes place via the traditional law enforcement channels. In the foreseeable future, assuming a strong development of an administrative approach to crime, a separate infrastructure is necessary to prevent strain on the current law enforcement channels.

Moreover, as has been addressed in the conclusion of this study, the European Union currently undertakes actions in several economic sectors, such as working with children or the transport sector. These instruments focus on the vulnerability of the relevant sectors, and are not necessarily meant to bar criminals from misusing the legal infrastructure, albeit in practice the same results can be achieved. These instruments include provisions addressing cross-border information-exchange of law enforcement information and convictions for the purposes of regulating that specific sector. This development should be further encouraged. The European Commission should explore in what manner these

business regulations can be utilized in order to facilitate information-exchange between administrative, law enforcement and fiscal authorities.

In spite of this latter positive observation, it must be addressed that further investment into sector-specific EU regulations could possibly lead to fragmentation of regulation, making it difficult for practitioners to work with. Consequentially, in the long term, implementation of a systematic and structured legal instrument addressing cross-border information exchange for the purposes of an administrative approach to crime should be considered.

Lastly, in light of the foregoing recommendations, the issues of privacy and data protection should be taken into account both within Member States and when developing instruments for cross-border purposes. This is an important, yet difficult balancing act between the right to privacy and the possibilities of governmental authorities to intervene. The underlying scope of this study focused on the potential for information-exchange rather than on privacy and data protection. Thus, it is recommended that the EU funds further research in this field.

#### **16.4 COMPREHENSIVE APPROACH TO IMPLEMENTATION OF THE RECOMMENDATIONS**

The recommendations concerning the further substantiation of the present common ground for an administrative approach to crime should not be seen in isolation. Rather, it is important to coordinate initiatives in the field of an administrative approach to crime with those in the context of anti-corruption and money laundering. The foregoing should be seen in the context of the Commission's intent to stimulate a horizontal approach to topics such as crime, above and beyond the vertical competences of the Commission's Directorate-Generals. Integrity of governmental bodies is crucial for a credible application of an administrative approach, particularly in the field of cross-border information exchange and cooperation between authorities. The European Commission should therefore consider the available instruments in these fields when promoting and supporting an administrative approach to crime.

Concluding, the above recommendations are important, yet non-exhaustive, building blocks for the development of an administrative approach to crime in the European Union. It is important to implement these recommendations in combination, instead of arbitrarily implementing one or two separately. A final recommendation it thus to implement the foregoing in the context of an comprehensive action plan on the level of the European Union as well as on the level of the Member States.

The Member States, supported by the European Union, need to take steps to prevent misuse of the legal infrastructure by criminal activities. The use of such instruments will

be beneficial for the integrity, reliability and credibility of the national and European authorities as well as for the legal and bona fide economic activities undertaken by European citizens. As seen, the concept of an administrative approach to crime in combination with multi agency cooperation is a commendable instrument for the road ahead.



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Fiammetta Di Stefano graduated in law with honours at *Università degli Studi di Milano Bicocca* in November 2012, with a dissertation on atypical wiretaps. After graduation she worked as a junior researcher at Transcrime, the Joint Research Centre on Transnational Crime of the *Università Cattolica del Sacro Cuore* and the University of Trento, at the Milan office. Her research interests are organised crime and anti-mafia legislation. At Transcrime she participated in two projects: “The administrative approach in the combat against (organized) crime” and “European Outlook on the Illicit trade in tobacco products”. At present she works as a legal trainee in a criminal law firm in Milan.

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Ana María Huesca is a Professor of Sociology at the *Universidad Pontificia Comillas* (Madrid, since 2001) as well as a researcher for the Research Unit and Social Studies Department at the same institution. Previously she was Lecturer at the Public University of Navarra (as from 1995) as well as at the National University of Distance Education (UNED). She holds a PhD in Political Science and Sociology from *Universidad Complutense*

of Madrid (1995) and has extensive experience in social research for various government agencies and numerous R&D, including the Centre for Sociological Research and the Institute for Advanced Social Studies of CSIC, many in the issue of security. Her main research activity is focused on the analysis of social problems such as those derived from unemployment, immigration and crime. Between her numerous publications, book chapters and several articles on these topics, one of her most remarked publications is the book “The perception of insecurity in Madrid” (2007). Since 2004 she is a Researcher Contact Point for the European Crime Prevention Network (EUCPN).

**L. (Lars) Korsell**

Lars Korsell is researcher at The Swedish National Council for Crime Prevention (Brå) and head of the Economic and Organised Crime Research Unit. He has a doctoral degree in criminology and a legal background as a judge (both administrative, civil and penal court) and is legal adviser at the Ministries of Finance and Justice. He has been responsible for many reports, publications and articles in the field of economic and organised crime, for example money laundering, assets recovery and the administrative approach.

**M. (Marcus) Norlin**

Affiliated with Brå, centre for knowledge about crime and crime prevention measures. The Swedish National Council for Crime Prevention (Brå) works to reduce crime and improve levels of safety in society. This is achieved by producing data and disseminating knowledge on crime, crime prevention work and the response of the criminal justice system to crime.

**M. (Małgorzata) Wąsek-Wiaderek**

Dr hab. Małgorzata Wąsek-Wiaderek – habilitated doctor’s degree in Law from the John Paul II Catholic University of Lublin; LLM at the KU Leuven; since 2002 associate Professor in the Department of Criminal Procedure, Criminal Executive Law and Forensic Sciences of the John Paul II Catholic University of Lublin; since 2004 member of the Research and Analyses Office of the Polish Supreme Court; since 2009 member of the Criminal Law Codification Commission; author of several publications on criminal procedure and protection of human rights in criminal procedure.

**A. (Adrian) Zbiciak**

Adrian Zbiciak is a PhD student in the Department of Criminal Procedure, Criminal Executive Law and Forensic Sciences, the John Paul II Catholic University of Lublin. In February 2013 he started the General Initial Training in The National School of Judiciary and Public Prosecution and in March 2014 he has started the Judicial Training, which aims to prepare the trainees to work as a court referendary and thereafter as a judge. Among

his academic research are amongst others: preliminary instigations; the common areas of criminal law and civil law, especially the preliminary ruling issue; organized, economic and fiscal crime. At the University he teaches criminal procedure (PhD practice).

**P. (Petr) Zeman LLM, PhD**

Petr Zeman works as a senior researcher at the Institute of Criminology and Social Prevention (IKSP) in Prague. He graduated in 1997 and holds a Master of Laws (LLM) at the Law Faculty of Charles University in Prague. In 2000 he completed a PhD degree in Criminal Law, Constitutional Law and Criminology at the same university. After one-year practice as a candidate attorney he joined IKSP, the leading workplace of criminological research in the Czech Republic. In 2005 he became a senior researcher at IKSP and since 2012 he acts as a Head of Research Section there. His main fields of professional interest include drug related crime and drug policy; penal policy; criminal proceedings; treatment of serious offenders.

# APPENDICES

## APPENDIX 1

### THE PRELIMINARY QUESTIONNAIRE

#### DEFINITIONS OF TERMINOLOGY – STUDY ON THE ADMINISTRATIVE APPROACH

*The definitions as described below are meant to conduct ‘Study on the possibilities to exchange information between administrative bodies and traditional law enforcement organizations to apply administrative measures within EU MS and at EU Level’.*

#### *I                      Definition of the administrative approach<sup>1</sup>*

*Please indicate in this form to a maximum of **two a4** whether the definition below of ‘administrative approach’ covers instruments to prevent crime in your Member-State and (shortly) describe these instruments.*

#### **Definition of the administrative approach:**

**The non-traditional approach, also known as administrative approach:** preventing the facilitation of illegal activities by denying criminals the use of the legal administrative infrastructure. Focus will be on:

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<sup>1</sup> **Helpful other definitions, meant to substantiate the above definition:**

**Competence:** the power of (administrative) government to utilize the tools to deny criminals the use of the legal infrastructure.

**Administrative government:** your Member State’s authorities, both on a central and local level, i.e. the central state organs, but also municipalities, cities, provinces etc.

**Legal infrastructure:** tools for citizens to perform activities, such as permits, licenses, subsidies, grants, tenders, etc.

**Serious crime:** offences committed by one or more persons for a prolonged or indefinite period of time, which offences are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly a financial or other material benefit. (Based on Europol. (2013 (March)). *Serious Organised Crime Threat Analysis (SOCTA)*: Europol. p. 41-42).

1. the preventive screening and monitoring of applicants (persons and legal entities) of permits, tenders and subsidies;
2. the power to close or expropriate premises when public nuisance occurs in or around those premises;
3. the possibility to seize assets of criminals in the framework of administrative procedure, outside the scope of a criminal procedure;
4. other regularly applied methods open to administrative authorities to tackle and prevent crime.

## II *Expert(s) and contact details*

*Please indicate (a) relevant (academic) expert(s) in the instruments as described by you in section I in your Member-State and provide their contact details.*

- (1) Name:
- University:
- Address:
- E-mail:
- Phone:
- (2) Name:
- University:
- Address:
- E-mail:
- Phone:
- Etc.

## APPENDIX 2

### THE RESPONDENTS PER COUNTRY

#### Belgium (visit: during 2014)

(Group) interview	Organisation
Annemie de Boye	City of Genk (BE)
Koen van Heddeghem	Vereniging van Vlaamse Steden en Gemeenten (VVSG)
Rachid Kerbab	FOD Binnenlandse zaken
Roger Leys	PZ Turnhout
Tom Kersemans	Dienst Vreemdelingenzaken
Simon Verdegem; Pieter-Jan Degrave <sup>1</sup>	Federal Police Commissioner General's Office, Directorate International Police Cooperation (CGI)
Anne Lambers; Johan Hegge	Stad Antwerpen
Florence Jacquemin Paul Carral Aldo Caprano	Dienst Vreemdelingenzaken Police zone Liege Police zone Liege

#### The Czech Republic (visit: week of 31 March)

(Group) interview	Organisation
Radim Bureš	Transparency International – Czech Republic
Martin Linhart; Julie Buzalkova	Ministry of the Interior – Security Policy Department
Petra Binkova; Jitka Gjuricova	Ministry of the Interior of the Czech Republic Crime Prevention Department
Michala Hanova; Ondrej Prancny	City of Prague, crime prevention managment
Stanislav Jaburek; Jana Sancova; Drobromila Machakova;	City of Brno

<sup>1</sup> Interview took place upon request of the respondents themselves, in light of the “Benelux Strategisch Overleg Politie”.

**France (15 October 2014)**

<b>(Group) interview</b>	<b>Organisation</b>
Denys Marion; Francis Freyssainge <sup>2</sup>	Groupements d'Intervention Régionaux

**Germany (visit: weeks of 7 April and 21 July 2014)**

<b>(Group) interview</b>	<b>Organisation</b>
Siggurd Jager; Mr. Albrecht	LKA Stuttgart
Olivier Maor; Birgit Laitenberger; Oliver Russ; Herr Kugel	Bundesministerium des Innern

**Italy (visit: week of 22 September 2014)**

<b>(Group) interview</b>	<b>Organisation</b>
Prefetto Marco Valentini; Roberta Serafini; Castras Derorad; Stafano Gambacurtat	Ministry of the Interior/Prefettura Rome
Vice Prefetto Dott. Ugo Taucer; Funzionario di Gabinetto dott.ssa Angela Lorella Di Gioia; Vice Prefetto Aggiunto dott.ssa Cecilia Nardelli; Vice Prefetto Aggiunto dott.ssa Marika Piscitelli	Prefettura Milan
Allessandro Pulcri <sup>3</sup>	Direzione Investigativa Antimafia (DIA)

**The Netherlands (visit: during 2014)**

<b>(Group) interview</b>	<b>Organisation</b>
Ferried Baali	Nationale Politie
Rick Schooff; Martin Peerstok	Landelijk Parket
Paul de Heer; Jan Hanssen	Ministerie van Veiligheid en Justitie
Meryem Bilici; Barry Velders	Dienst Justis
Gerard van Rienen	Ministerie van Veiligheid en Justitie

2 On 15 October 2014, during the LIEC seminar, we were able to attend Mr. Freyssainge's presentation.

3 On 15 October 2014, during the LIEC seminar, we were able to attend Mr. Pulcri's presentation.



<b>(Group) interview</b>	<b>Organisation</b>
Bas ter Luun; Brian Varma	Gemeente Amsterdam (bestuurlijke en geïntegreerde aanpak)
Karel Schuurman	LIEC
Fleur Voeten	RIEC Limburg
Marjo Goessen-Vranken	RIEC Limburg
Niels Lahey	RIEC Limburg
Jesse Koning	Landelijk Bureau Bibob
Cyril Springveld; Gaby Laane	Ministerie van Veiligheid en Justitie

**Poland (visit: week of 19 May 2014)**

<b>(Group) interview</b>	<b>Organisation</b>
Mariusz Cichomski; Miroslaw Kamunek	Ministry of the Interior
Janusz Sliwa and 2 colleagues	Prosecutor's office Krakow
Piotr Przybylek and colleagues	GIFI/FIU (Ministry of Finance)

**Spain (visit: week of 15 September 2014)**

<b>(Group) interview</b>	<b>Organisation</b>
Mario Lapena Gutierrez; Daniel Sanchez Benavente	Ministry of Finance and Public Administration
Jose Luis Leal; Raquel Cabeza Perez; Mar Arias	General sub directorate of Finance Administration
Jose Maria de las Cuevas	Guarda Civil
Fernando Camacho Erranz	Asset tracing Recovery Office
Andres Perez Lopez	CICO/ARO
Narciso de Foxa Alfaro; Isabel Conde; representative of the local police; representative of the licensing office	City of Majadahonda's
Paloma Garcia Romero; Catalina Benanceu	District of Tetuan (Madrid)
Jorge Rosal Cosano	National Police
Jose Manuel Colodras	National Police

**Sweden (visit: week of 3 March 2014)**

<b>(Group) interview</b>	<b>Organisation</b>
Thomas Falk	Forsakringskassan
Stefan Kronqvist; Stefan Andersson Hans Ölander; Rikard Henriksson	Economic crime agency (Finanspolisen)
Lars Klint; Goran Erixon; Eva Rudolf	Kronofogden
Jan Landstrom; Per-Olof Andersson	Nacka Project
Fredric Ardot	Finansinspektionen
Bjorn Blomqvist	Aklagare (public prosecution)
Mikael Kyller	Swedish Transport Agency
Carina Cutlip	City of Stockholm.Tillstandsenheten
Helena Lans	City of Gothenburg, centre of knowledge
Annelie Silvander	City of Gothenburg. Tillstandsenheten
Goran Brunberg	City of Gothenburg. Procurement Office

**The United Kingdom (visit: week of 5 May 2014)**

<b>(Group) interview</b>	<b>Organisation</b>
Chris Todd; Tony Waldron	NCA
Jeff King	NCA (legal)
Jo Bell	Home Office Strategic Centre for Organised Crime
Paul Aspinall; Marge Foley	NCA Intelligence Hub/ NCA International Crime Bureau
Caroline Simpson <sup>4</sup>	GAIN (national coordinator)
Ronnie Megaughin	Police Scotland
Steve Welsh	NCA Head of Behavioural Science

4 On 15 October 2014, during the LIEC seminar, we were able to attend Ms. Simpsons presentation, providing an update on the workings of GAIN.

## APPENDIX 3

### TOPIC LISTS FOR THE SEMI-STRUCTURED INTERVIEWS

#### I. TOPIC LIST – NATIONAL POLICY MAKERS

1. *The national possibilities of an administrative approach in the relevant country*

**NB: the interviewer only needs to focus on the applicable topics for the current practitioner.**

#### **Screening/monitoring**

1. Which possibilities exist in [COUNTRY] to screen or monitor (legal) persons before – a for them – positive administrative decision (e.g. license, subsidy or tender) has been taken?
2. Which possibilities exist in [COUNTRY] to monitor (legal) persons for suspicious activities after an administrative decision has been taken?
3. Which organisations/units are involved in the screening/monitoring of (legal) persons in [COUNTRY]?
4. Which kind of information can be used when screening/monitoring (legal) persons?
5. Which infrastructure is used to exchange information between the involved organisations/units?
6. Which limitations adhere to the use of information when screening/monitor (legal) persons?
7. Can you indicate any (future) developments in this area in [COUNTRY]?

#### **Closing/expropriating premises**

1. Which possibilities exist to close or expropriate premises by the administrative authorities of [COUNTRY] when nuisance occurs in or around those premises?
2. Which unit(s)/organisation(s) can be involved in this process?
3. What kind of information can lead to the closure or expropriation of premises?
4. Is there a need for information from other EU member-states when closing/expropriating premises? If affirmative: in what way? When does this need arise? How can the information be used?

5. Can you indicate any (future) developments in this area in [COUNTRY]?

#### **Forfeiture of criminal assets**

1. Which possibilities exist in [COUNTRY] forfeit criminal assets outside the scope of criminal law?
2. If affirmative, which units/organisations can be involved in this process?
3. What kind of information can lead to forfeiture?
4. Is there a need for information from other EU member-states when forfeiting criminal assets? If affirmative: in what way? When does this need arise? How can the information be used?
5. Can you indicate any (future) developments in this area in [COUNTRY]?

#### **Possibilities other methods**

1. Which other methods – apart from the ones above – do you have to prevent criminals from infiltrating the legal infrastructure?

## *II. Sharing of information with other EU Member States*

#### **Outgoing requests for information**

1. In [COUNTRY] is it possible to request for information regarding administrative decisions (e.g. license/subsidy/tender) by administrative authorities, concerning:
  - a. *judicial information*,
  - b. *police information*,
  - c. *administrative information*,
  - d. *fiscal information*?
2. If affirmative, which national infrastructure(s) can the involved administrative authorities utilize to request for such information?
3. If affirmative, which **international** infrastructure(s) can the involved administrative authorities utilize to request for such information?
4. Can you identify which authorities/organisations/units in other EU Member States you approach for the above types of information? (10 research countries).
5. If possible, to which legal limitations must the request adhere?
6. If possible, practical limitations are there for such requests?

#### **Incoming requests for information**

1. In [COUNTRY] is it possible to share information with administrative authorities of other EU Member States upon request when those foreign administrative authorities need to make a decision (e.g. license/subsidy/tender), concerning:

- a. *judicial information,*
- b. *police information,*
- c. *administrative information,*
- d. *fiscal information?*
2. If possible, which infrastructure(s) can be used by the foreign administrative authorities to make such a request?
3. If possible, to which legal limitations must the request by foreign administrative authorities adhere?
4. If possible, practical limitations are there for requests by foreign administrative authorities?

#### **Future information-exchange**

1. Which future possibilities for (further) sharing of information with other EU Member States can you envision?
2. Which problems can you identify for (further) information sharing with other EU Member States?
3. Which opportunities can you identify for (further) information sharing with other EU Member States?
4. In your opinion, how would you enhance information-exchange to and from administrative authorities in the EU?

## **II. TOPIC LIST PRACTITIONERS**

- I. *The practical application of the administrative approach in the country*

***NB: the interviewer only needs to focus on the applicable topics for the current practitioner.***

#### **Screening/monitoring**

1. In what way are applicants (natural or legal persons) for an administrative decision screened by (or with help of) your unit?
2. Which information sources are used for the screening/monitoring?
3. Which actors/organisations do you approach when gathering this information? With which actors do you cooperate? How does this cooperation take form?
4. Which process is used to screen the persons after the information has been gathered?
5. What are the possible outcomes of the screening?
6. Who is notified of the outcomes of the screening?
7. Which organisation decides upon the initial application or revocation of the decision (see question 1)?

8. Which best practices can you identify in the screening process?
9. Which problems can you identify in the screening process?

### **Closing/expropriating premises**

1. Does your unit/organisation have to power to close or expropriate buildings when nuisance occurs?
2. Which (type of) information is necessary before one can decide to close or expropriate premises?
3. How do you gather this information? Can you give (case) examples?
4. Which (other) actors/organisations do you approach to gather this information? Can you give (case) examples?
5. Do you find it necessary to obtain information from other EU member states when applying this power? When affirmative: Can you give (case)examples?
6. Which process is used before and after the decision to close or expropriate premises?
7. Which best practices can you identify?
8. Which problems can you identify?

### **Forfeiture of criminal assets**

1. Does your unit/organisation have to possibility to forfeit (\*take away\*) criminal assets outside the scope of criminal law?
2. Which kind of information can lead to forfeiture of criminal assets?
3. How do you obtain this information? Can you give (case)examples?
4. Which (other) actors/organisations do you approach to gather this information? Can you give (case) examples?
5. While obtaining such information, do you find it necessary to obtain information from other EU member-states? When affirmative: Can you give (case)examples?
6. Which process is used when criminal assets are forfeited?

### **Possibilities other methods**

1. Which other methods – apart from the ones above – do you have to prevent criminals from infiltrating the legal infrastructure?

## *II. Sharing of information with other EU member-states*

### **Outgoing requests for information**

As indicated above, you've mentioned that you need information from other EU Member States in certain situations. I would like to ask some further questions regarding this issue.

1. In what moments do the need for information from other EU Member States arise? Can you give (case) examples?
2. What kind of information have you requested (judicial/police/administrative/fiscal)?
3. Which units/organisations in other EU Member States have you in such instances approached?
4. How have you approached these units/organisations (via the national judicial/police/administrative/fiscal infrastructure or via the international judicial/police/administrative/fiscal infrastructure or directly)?
5. Which best practice can you identify? Can you give (case) examples?
6. Which problems can you identify? Can you give (case) examples?

#### **Incoming requests for information**

1. Have you ever been approached to share information with another EU Member States for administrative purposes?
2. Which unit(s)/organisation(s) have approached you?
3. How have these unit(s)/organisation(s) approached you (via the national judicial/police/administrative/fiscal infrastructure or via the international judicial/police/administrative/fiscal infrastructure or directly)?
4. What kind of information was requested (judicial/police/administrative/fiscal)?
5. Were you able to share this information? Why (not)?
6. Which best practice can you identify? Can you give (case) examples?
7. Which problems can you identify? Can you give (case) examples?

#### **Future information-exchange**

1. Which future possibilities for (further) sharing of information with other EU Member States can you envision?
2. Which problems can you identify for (further) information sharing with other EU Member States?
3. Which opportunities can you identify for (further) information sharing with other EU Member States?
4. In your opinion, how would you enhance information-exchange to and from administrative authorities in the EU?

